DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1036
Title: Mississippi, ex rel. Jim Hood, Attorney General, Petitioner
v.
AU Optronics Corporation, et al.
Docketed: February 22, 2013
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (12-60704)
Decision Date: November 21, 2012
Rehearing Denied: February 4, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 19 2013	Petition for a writ of certiorari filed. (Response due March 25, 2013)
Mar 22 2013	Order extending time to file response to petition to and including April 24, 2013.
Mar 25 2013	Brief amicus curiae of Public Citizen, Inc. filed.
Apr 24 2013	Brief of respondents AU Optronics Corporation, et al. in opposition filed.
May 6 2013	Reply of petitioner Mississippi, ex rel. Jim Hood, Attorney General filed. (Distributed)
May 7 2013	DISTRIBUTED for Conference of May 23, 2013.
May 28 2013	Petition GRANTED.
Jun 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 22, 2013.
Jun 12 2013	The time to file respondents' brief on the merits is extended to and including September 3, 2013.
Jul 22 2013	Joint appendix filed. (Statement of costs filed.)
Jul 22 2013	Brief of petitioner Mississippi, ex rel. Jim Hood, Attorney General filed.
Jul 29 2013	Brief amici curiae of Illinois and 45 Other States filed.
Jul 29 2013	Brief amicus curiae of AARP filed.
Jul 29 2013	Brief amicus curiae of Public Citizen, Inc. filed.
Jul 29 2013	Brief amicus curiae of Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. filed.
Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Wednesday, November 6, 2013.
Sep 3 2013	Brief of respondents AU Optronics Corporation, et al. filed. (Distributed)
Sep 9 2013	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Sep 10 2013	Brief amici curiae of Access to Courts Initiative, Inc., and National Association

	of Manufacturers filed. (Distributed)
Sep 10 2013	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Sep 10 2013	Brief amicus curiae of Allstate Insurance Company filed. (Distributed)
Sep 10 2013	Brief amici curiae of Pharmaceutical Research and Manufacturers of America, et al. filed. (Distributed)
Sep 10 2013	Records from U.S.C.A. for 5th Circuit and U.S.D.C. for Southern District of Mississippi are electronic.
Oct 3 2013	Reply of petitioner Mississippi, ex rel. Jim Hood, Attorney General filed. (Distributed)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-1036

No. 12-

Supreme Court, U.S.
FILED
FEB 19 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: February 19, 2013

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Dated: February 19, 2013

QUESTION PRESENTED

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Respondents include AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated; and Chunghwa Picture Tubes Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Mississippi, ex rel. Jim Hood, Attorney General, respectfully petitions for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 701 F.3d 796. *See also* Pet. App. at 1a–22a. The decision of the U.S. District Court for the Southern District of Mississippi is reported at 876 F. Supp. 2d 758. *See also* Pet. App. at 23a–60a.

JURISDICTION

The Fifth Circuit issued its decision on November 21, 2012, *id.* at 1a, and issued its Judgment and Mandate on the same date, *id.* at 62a.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, provides in part:

> **(d)**
>
> **(1)** In this subsection—
>
> **(A)** the term "class" means all of the class members in a class action;

---

[1] The Fifth Circuit issued an order denying rehearing on February 4, 2013. Pet. App. at 63a–65a. This petition is timely without regard to the rehearing petition.

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

. . .

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or

a citizen or subject of a foreign state.

. . .

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

. . .

(III) all of the claims in the action are asserted on behalf of the general public (and not on

> behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> . . .
>
> **(C)**
>
> (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

28 U.S.C. §1332.

Relevant provisions of the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, *id.* § 75-24-1 *et seq.*, are set forth in the Appendix.

STATEMENT OF THE CASE

In 2008, the Fifth Circuit became the first court of appeals to address the question of whether a state's *parens patriae* lawsuit is removable to federal court as a "mass action" under CAFA.[2] *See*

[2] A CAFA mass action is defined as a civil action in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C. § 1332(d)(11)(B)(i). A mass action meeting this definition is deemed a class action for purposes of CAFA removal. *Id.* § 1332(d)(11)(A).

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008). The court answered the question in the affirmative.

Since then, three circuits have addressed exactly the same question, and each has reached the *opposite* conclusion:

- *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), *petition for cert. filed*, No. 12-911 (Jan. 23, 2013);

- *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); and

- *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2011).

In the decision below, the Fifth Circuit reaffirmed its dissonant position. *See* Pet. App. at 4a–5a.

This circuit conflict has led to inconsistent jurisdictional outcomes. Indeed, this circuit conflict is so profound that cases involving the *same claims*, arising out of the *same conduct* by the very *same Defendants* have been remanded to state court in the Fourth, Seventh, and Ninth Circuits, but retained in federal court in the Fifth Circuit.[3] The Fourth, Seventh, and Ninth Circuits found no federal jurisdiction; the Fifth Circuit found federal jurisdiction as a CAFA mass action. Absent review by this Court, federal jurisdiction over state *parens patriae* lawsuits will continue to depend entirely on

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[3] Compare the decision below with *South Carolina*, 699 F.3d at 392; *Madigan*, 665 F.3d at 773; and *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848-49 (9th Cir. 2011).

the location of the federal court to which the suit is removed.

Review is also amply warranted because the Fifth Circuit's judgment runs counter to elementary principles of federalism and state sovereignty and conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the "real party in interest" test, and the narrow construction of removal statutes. The Fifth Circuit's decision prevents state attorneys general from bringing *parens patriae* suits in state court, even when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. Nothing in CAFA supports such an invasion into state sovereign prerogatives.

The same question presented is currently pending before this Court in the certiorari petition in *AU Optronics Corp. v. South Carolina*, No. 12-911. In that case, petitioners AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc.—all of which are respondents here and were Defendants in the courts below in this case—urge this Court to grant certiorari over essentially the same question presented, on the basis that there is a clear and substantial circuit split regarding the interpretation of CAFA with respect to *parens patriae* actions.

Mississippi submits that the instant petition is a better vehicle for deciding this question. While the Fifth Circuit's approach has been disavowed by every other court of appeals to consider the question, in the decision below, the Fifth Circuit reaffirmed its precedent and its conflict with three other circuits. The decision in this case contains a full explication of

the Fifth Circuit's views, and all relevant dimensions of the question are squarely before this Court.

This Court's review is warranted.

I. Background

On March 25, 2011, Mississippi commenced this action in state court, alleging that Defendants had engaged in price fixing of liquid crystal display (LCD) panels. Pet. App. at 24a. The lawsuit was brought in the name of the State, asserting claims under the Mississippi Antitrust Act (MAA) and the Mississippi Consumer Protection Act (MCPA).

As remedies, the complaint sought: (1) a permanent injunction prohibiting the Defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of up to $10,000 per violation under the MCPA; (3) civil penalties of up to $2,000 per month, per Defendant under the MAA; (4) restitution to the State for its own losses caused by purchasing LCD panel products during the relevant time period; (5) restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant period; (6) punitive damages; and (7) other relief, including costs, pre- and post-judgment interest, and attorney's fees. *Id.* at 25a–26a.

Mississippi's lawsuit is one of thirteen *parens patriae* lawsuits against most of these same Defendants brought by the Attorneys General of Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West

Virginia, and Wisconsin.[4] Some of these cases alleged both state and federal claims and were commenced in federal court.[5] A consolidated multi-district litigation (MDL) is pending in the Northern District of California and includes some of these attorney general actions as well as various private indirect purchaser class actions (including a Mississippi indirect purchaser class).[6] *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal. filed Apr. 20, 2007).

Five of the thirteen state attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in their state courts asserting only state law claims. Defendants removed each of these actions to federal

---

[4] *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Rosenblum v. AU Optronics Corp.*, No. 3:07-md-1827 (N.D. Cal); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics Corp.*, No. 10 CH 34472 (Cir. Ct. of Cook County); *Washington v. AU Optronics Corp.*, No. 10-2-29164-4 (King County Dist. Ct.).

[5] *See* Compl. for Damages, Civil Penalties, Injunctive and Other Relief (Dkt. 1), *Missouri ex rel. Koster v. AU Optronics Corp.*, No. 3:10-cv-03619 (N.D. Cal. filed Aug. 17, 2010).

[6] The indirect purchaser class action pending in the MDL, including the case on behalf of Mississippi consumers, has settled. The MDL Court's preliminary approval order indicated that the settlement would release all claims brought by the individual claimants but would not foreclose *parens patriae* claims being asserted by non-settling state attorneys general. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal.) (Dkt. 4688).

court based upon CAFA jurisdiction. In all five cases, the district court remanded the case to state court, finding CAFA jurisdiction lacking. *See* Pet. App. at 15a n.3. In each case, *except for this one*, the circuit court upheld the district court's remand, agreeing that CAFA jurisdiction was lacking.[7]

II. The District Court's Decision

On June 9, 2011, Defendants removed this case on the grounds that it was either a "class action" or a "mass action" under CAFA. *Id.* at 26a. The district court granted the State's motion to remand, finding that Mississippi had filed the action to "protect the State's 'quasi-sovereign interest' in its economy and its citizens' economic well being." *Id.* at 24a. The district court found that "[w]ith this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens." *Id.*

First, the district court found that this action was not a class action within the meaning of CAFA. *Id.* at 40a–44a. Second, the district court found that, under the binding Fifth Circuit precedent of *Caldwell*, the Attorney General's lawsuit constituted a "mass action" under CAFA. *Id.* at 44a. *Caldwell* mandates a "claim-by-claim" analysis to determine CAFA jurisdiction, instructing that courts must isolate each claim for relief in a *parens patriae* lawsuit to count up the number of consumers who may benefit from that claim. If it appears there may be more than 100 such beneficiaries, the lawsuit is a "mass action" within the meaning of CAFA. *See* 536 F.3d at 429–30.

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[7] *See* cases cited *supra* note 3.

Despite its conclusion that the case qualified as a "mass action" under *Caldwell*, the district court nevertheless remanded the case because it found that all of the claims had been asserted "on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" and, therefore, fell into the "general public exception" to CAFA mass action jurisdiction. Pet. App. at 48a–52a. The district court cited substantial scholarly commentary supporting the view that CAFA does not apply to *parens patriae* actions by state attorneys general. *See id.* at 47a.

III. The Court of Appeals' Decision

The Fifth Circuit reversed the district court's remand order. As a preliminary matter, citing the binding precedent of *Caldwell*, the Fifth Circuit agreed with the district court's conclusion that Mississippi's lawsuit was a mass action within the meaning of CAFA. *Id.* at 4a–5a. Applying the claim-by-claim approach mandated by *Caldwell*, the Court of Appeals opined that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a.

However, the Court of Appeals reversed the district court's ruling that the general public exception was applicable. The Fifth Circuit acknowledged that its decision, finding the exception inapplicable, "may render such statutory exception a dead letter." *Id.* at 9a. As a result, the Court indicated that it "welcome[d] congressional clarification of this issue." *Id.* at 10a.

Judge Elrod, concurring in the judgment, wrote separately to urge reconsideration of the *Caldwell* decision: "*Caldwell*'s claim-by-claim

approach is problematic when applied to CAFA's 'mass action' provision in *parens patriae* suits such as the instant case." *Id.* at 12a. While acknowledging that the majority opinion in this case was "a fair application" of Fifth Circuit binding precedent, the concurrence nonetheless recognized that "every court of appeals to address the issue since *Caldwell* has rejected [the Fifth Circuit's] approach." *Id.* at 12a, 16a (citing *South Carolina*, 699 F.3d at 393-94; *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *Madigan*, 665 F.3d at 773-74).

Specifically, Judge Elrod noted:

> Here, as the majority opinion shows, applying the claim-by-claim approach leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim, so this is a "mass action" under CAFA. This result is the exact opposite of the outcome in many other similar lawsuits around the country. That so many other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that we should consider whether we have staked out the correct position. I believe we have not.

Pet. App. at 14a–15a (footnotes omitted).

The concurrence also pointed to the lack of statutory support for the claim-by-claim approach and its consequential nullification of the general public exception. First, "the claim-by-claim approach does not find a foothold in CAFA's text." *Id.* at 17a. Indeed, nothing in the text "suggest[s] that, in a case in which a single plaintiff brings suit,

a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief." *Id.* "Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be 'strictly construed.'" *Id.* at 18a (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). Further, Judge Elrod observed that "just as troubling, applying *Caldwell's* reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law." *Id.* at 12a.

Mississippi filed a petition for rehearing en banc, which was denied on February 4, 2013. *Id.* at 64a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's judgment warrants plenary review by this Court. First, it is beyond reasonable dispute that the Fifth Circuit's decision directly conflicts with the decisions of the Fourth, Seventh, and Ninth Circuits. The Fifth Circuit's judgment also conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the real party in interest test, and the requirement that removal statutes such as CAFA be strictly construed. The decision below involves an important and recurring issue of federal law and runs counter to deeply-rooted principles of federalism. The Fifth Circuit's decision will result in additional, wasteful jurisdictional battles and administrative

complexity.[8] Review by this Court is amply warranted.

I. The Fifth Circuit's Judgment Conflicts with Decisions in Other Circuits.

The Fifth Circuit's conclusion that *parens patriae* actions brought by state attorneys general are removable under CAFA as mass actions is at odds with every other circuit court that has addressed the issue, as acknowledged by the concurrence in the Fifth Circuit's decision below. *Id.* at 16a–17a.

The circuit conflict regarding the removability of *parens patriae* actions under CAFA is unusually concrete and well suited to this Court's review. The conflict is not abstract. Several of the cases involve *the very same LCD lawsuits* against the *very same Defendants*. Accordingly, the circuit conflict has produced *different* results in the *same litigation*. As the concurring opinion in the court below explained, the outcome here is the "exact opposite" of the outcome of all other LCD price-fixing *parens patriae* cases proceeding in various state courts against these very same Defendants. *Id.* at 14a, 15a & n.3.

The circuit split is intolerable as a matter of federalism. Whether a state, through its attorney general, may assert a *parens patriae* action in state court should not depend on where that state is

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[8] Indeed, the circuit split on whether *parens patriae* suits are removable as mass actions under CAFA has initiated two petitions for a writ of certiorari in the past month alone: *AU Optronics Corp. v. South Carolina* and the instant petition. These petitions further demonstrate that the split is deep and mature, and will not be resolved absent plenary review by this Court.

located. Nor should the interpretation of the CAFA removal provision be circuit-dependent. A uniform, nationwide rule affirming the authority of state attorneys general to bring *parens patriae* actions in state court is appropriate.

Further, the instant case presents the best vehicle for resolving the circuit split. The Fifth Circuit has taken a solitary approach in applying the CAFA removal statute to *parens patriae* actions. Its approach has been rejected by every subsequent court of appeals to consider the question. And, based upon its judgment below, it is clear that *Caldwell*'s claim-by-claim approach will continue to be applied in the Fifth Circuit to *parens patriae* claims. The opinion in this case contains a full explication of the Fifth Circuit's views, so all relevant dimensions of the question are squarely before this Court. The issue is cleanly presented by the instant case and ripe for this Court's consideration.

A. Seventh Circuit

The Seventh Circuit was the first circuit to reject *Caldwell*'s holding that a *parens patriae* lawsuit is a mass action within the meaning of CAFA. In *LG Display Co. v. Madigan*, the Illinois attorney general brought a *parens patriae* lawsuit against some of the same Defendants being sued by Mississippi in this case, based upon violations of the Illinois Antitrust Act. 665 F.3d at 773. Defendants removed Illinois's lawsuit to federal court under CAFA.

Defendants urged the Seventh Circuit to follow *Caldwell*'s holding and separately determine the real parties in interest in each of Illinois's claims in order to find out "what's *really* going on in this

suit." *Id.* at 772 (emphasis in original). Defendants conceded that there was only one plaintiff and also that Illinois was the real party in interest for the enforcement-related claims. They nevertheless claimed that the 100 or more residents of Illinois on whose behalf the Illinois attorney general was seeking restitution were the real parties in interest for that claim. *Id.* at 772-73.

The Seventh Circuit discussed *Caldwell* at length and concluded that the district court was correct in rejecting *Caldwell's* claim-by-claim approach. *Id.* at 773 ("The district court was in good company; claim-by-claim analysis has been questioned by a number of courts." (citations omitted)). The Seventh Circuit noted that the Fifth Circuit did not adopt its approach "based on any language in CAFA itself, nor is there any language to be found." *Id.* The Seventh Circuit also rejected the Fifth Circuit's attempt to "rationalize[ ] its claim-by-claim approach as consistent with Congress' intent." *Id.* Looking at the complaint as a whole, the court held that Illinois's *parens patriae* suit was not a mass action under CAFA.

The Seventh Circuit's holding—that CAFA jurisdiction was lacking over the *parens patriae* lawsuit—is directly contrary to the Fifth Circuit's decision with respect to the very same Defendants in this case.

B. Ninth Circuit

In *Nevada v. Bank of America*, the Ninth Circuit expressly considered the Fifth Circuit's claim-by-claim approach and rejected it. 672 F.3d at 669. In that case, the Nevada attorney general filed a *parens patriae* lawsuit against Bank of America,

alleging the bank misled Nevada consumers in mortgage transactions. The defendants removed the action to federal court under CAFA.

The Ninth Circuit rejected defendants' argument that the case was removable as a mass action. The court noted that the two circuits that had already addressed the issue had "reached conflicting results." *Id.* at 668. In declining to follow *Caldwell's* claim-by-claim approach, the Ninth Circuit instead examined "'the essential nature and effect of the proceedings as it appears from the entire record.'" *Id.* at 670. The court found that Nevada's status as the real party in interest was "not diminished merely because it has tacked on a claim for restitution." *Id.* at 671. Instead, the court concluded that the "Complaint, read as a whole, demonstrates that Nevada is the real party in interest in this action, . . . so the action falls 99 persons short of a 'mass action.'" *Id.* at 672.[9]

The Ninth Circuit's decision in *Bank of America* is flatly contrary to the decision in this case.

C. Fourth Circuit

In October 2012, the Fourth Circuit joined the Seventh and Ninth Circuits in rejecting the Fifth Circuit's claim-by-claim approach. The context was another *parens patriae* action against some of the same Defendants involved in this case. *AU*

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[9] The Ninth Circuit had already addressed whether a *parens patriae* action brought by the attorneys general of Washington and California against some of these same LCD Defendants was removable under CAFA as a *class* action. In *Washington v. Chimei Innolux Corp.*, the Ninth Circuit held that the two states' *parens patriae* lawsuits were not removable as class actions. 659 F.3d 842 (9th Cir. 2011).

Optronics Corp. v. South Carolina, 699 F.3d 385, 392 (4th Cir. 2012).[10]

South Carolina asserted claims under a statutory scheme strikingly similar to the state laws under which Mississippi sues here.[11] The Fourth Circuit analyzed *Caldwell* at length and became the third circuit court of appeals to decline to follow it. In its opinion, the Fourth Circuit explicitly acknowledged the circuit split: "[o]ur sister circuits have disagreed somewhat on whether to apply the 'whole-case approach' or the 'claim-by-claim approach' to the resolution of similar jurisdictional disputes." *Id.*

The Fourth Circuit rejected the Fifth Circuit's claim-by-claim approach to *parens patriae* actions:

> The State, in these *parens patriae* actions, is enforcing its own statutes in seeking to protect its citizens against price-fixing conspiracies. That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings. Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State's claims.

Id. at 394. The Fourth Circuit concluded: "We therefore agree with the Ninth and the Seventh Circuits that a claim for restitution, when tacked

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[10] On January 23, 2013, Defendants filed a petition for certiorari with this Court as No. 12-911.

[11] *Compare* Miss. Code Ann. §§ 75-24-9 & 75-24-11, *with* S.C. Code § 39-5-50.

onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings."[12] *Id.*

Thus, in its judgment below and in its decision in *Caldwell*, the Fifth Circuit is in conflict with the Fourth, Seventh, and Ninth Circuits, which will inevitably lead to inconsistent jurisdictional outcomes. Only this Court can resolve the conflict among the circuits regarding whether a *parens patriae* lawsuit brought in state court by a state attorney general pursuant to state statutes and common law is removable as a mass action under CAFA.

II. The Fifth Circuit's Judgment Conflicts with Decisions of this Court.

A. *Parens patriae* actions

Parens patriae actions are cases in which the state, by definition, "'must be deemed to represent all its citizens'" and not be subject to intervention and joinder by such constituent individuals in the absence of a showing of "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373-74 (1953). This Court has described the "prerogative of *parens patriae*" as "inherent in the supreme power of every state," and opined that it is "often necessary to be exercised in the interests of humanity, and for the

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[12] In reaching its holding, the Fourth Circuit cited as instructive *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, which held that a *parens patriae* action is not removable as a class action. 646 F.3d 169, 174, 176 & n.2 (4th Cir. 2011).

prevention of injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

In *Snapp*, this Court confirmed a state's standing to sue as *parens patriae* to protect its sovereign and quasi-sovereign interests. These fundamental interests include "the power to create and enforce a legal code," *id.* at 601, and the protection of the "health and well-being—both physical and economic—of its residents in general," *id.* at 607. Furthermore, this Court's precedent rejects the view that *parens patriae* actions should involve the joinder of the constituent citizens on whose behalf the state seeks to act.[13]

The Fifth Circuit's judgment conflicts with this precedent. In reaching its decision below, the Fifth Circuit determined that removal jurisdiction existed under CAFA because Mississippi citizens were the real parties in interest for Mississippi's restitution claim. Pet. App. at 5a–6a. In undertaking that analysis, the Fifth Circuit answered a question it need not have ever asked and failed to apply this Court's instruction that a state has the authority to vindicate its *own* interest in bringing a *parens patriae* action.

Mississippi law grants the Attorney General direct authority to bring such an action on

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[13] Unless individual monetary relief claims "are proposed to be tried jointly," CAFA's mass action definition is not satisfied. 28 U.S.C. § 1332(d)(11)(B)(i).

behalf of citizens in the State.[14] Nothing in that authority requires that *parens patriae* cases attempt to try citizens' claims jointly. To the contrary, the point of *parens patriae* cases is to permit a state's appointed officer to bring claims on behalf of the whole state and its citizens in the absence of direct participation of and control by individuals.[15]

Under this Court's precedent, there is one plaintiff in this case: the State. The Fifth Circuit's judgment, finding the State's *parens patriae* action to be a mass action, is thus contrary to this Court's precedent.

B. Real party in interest test

The Fifth Circuit's judgment is inconsistent with this Court's precedent regarding the real party in interest test. Federal courts should generally not interfere with the nomenclature of the complaint and the parties selected for inclusion, absent the use of "an *unacceptable* device to defeat diversity."

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[14] Provisions of both the MAA and the MCPA establish that the Attorney General possesses the authority to assert claims for monetary and injunctive relief in the name of the State on behalf of the public interest and for the public welfare. Miss. Code Ann. §§ 75-21-1, -21-37, -24-9, -24-11. The Attorney General also possesses "the powers of the Attorney General at common law," *id.* § 7-5-1, which powers include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights," *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss. 1973) (citations omitted).

[15] Under the MCPA, intervention by or joinder of individuals is not expressly authorized where the Attorney General has sued in the name of the State on behalf of unnamed citizens. *See generally* Miss. Code Ann. § 75-24-1 *et seq.*

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 93 (2005) (emphasis added) (quoting 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][c], at 107-67 (3d ed. 2005)).

This Court has consistently held that a state's overall interest in the case it has brought in its name is the determinative inquiry, not who may ultimately benefit from the relief sought. When determining whether a state is suing properly under its *parens patriae* authority, and therefore as the real party in interest for jurisdictional purposes, this Court has considered the "gravamen" of the complaint as a whole, and *all* the interests sought to be realized therein. *See Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 452 (1945) (holding that state was not merely nominal party where it sued for damages and injunctive relief in both its proprietary capacity and as *parens patriae* on behalf of individual shippers, and "the gravamen of [the suit] runs far beyond the claim of damage to individual shippers"); *cf. In re State of New York*, 256 U.S. 490, 500 (1921) (holding that whether a state is the real party in interest is to be determined "by the essential nature and effect of the proceeding, as it appears from the entire record").

Even where the state seeks a mix of proprietary relief and relief on behalf of private citizens, a state may sue as the *sole* plaintiff and real party in interest for purposes of jurisdiction. *See Kansas v. Colorado*, 533 U.S. 1, 8–9 (2001) (where state filed suit seeking to prevent continued harm to public and sought monetary relief, even calculated in part on injuries to individual citizens, Court held that state "unquestionably" demonstrated it is the real party in interest for purposes of jurisdiction). This is true even if private injury stands as the basis

for relief to the state alone. *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987) (holding that request for restitution to the state, even though based on calculation of harm to individual citizens, would benefit the state, creating a general public interest sufficient to establish that state was proper plaintiff).

Finally, this Court considers a state the real party in interest when it seeks monetary relief on behalf of consumers where a sufficiently significant segment of its population has been harmed. *Snapp*, 458 U.S. at 607; *see also Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (state may act as real party in interest as representative of its citizens where injury alleged affects general population of state in substantial way). The named plaintiff is the real party in interest where it (rather than individual beneficiaries) controls the litigation.[16]

The Fifth Circuit's judgment conflicts with these decisions. In none of these cases has this Court looked to the citizenship of private parties for jurisdictional purposes, nor has it required that they be joined to the litigation. As long as the named party seeks relief that benefits the named plaintiff in such circumstances, "the fact that others are interested who are not necessary parties, and are not made parties," will not give cause to question the

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[16] *See Kansas*, 533 U.S. at 8-9 (Kansas not mere nominal party where it sued in *parens patriae* and had right to control litigation while injured individual citizens did not); *Knapp v. R.R. Co.*, 87 U.S. 117, 123 (1873) (trustees who sued for benefit of others and not themselves were real parties in interest where claim accrued to them, they controlled the litigation and were responsible for conducting it, and where beneficiaries could not prevent institution or prosecution of actions or exercise any control over them).

plaintiff's real interest. *Little v. Giles*, 118 U.S. 596, 603 (1886). The only cases holding that a named state plaintiff is not the real party in interest for purposes of federal jurisdiction are those where *none* of the relief benefited the state and *all* of the relief benefited a limited number of other parties.[17]

The Fifth Circuit acknowledged this is not a case where *none* of the relief benefits the state and *all* of the relief benefits a limited number of other parties. Pet. App. 5a (noting that Mississippi's lawsuit included allegations that "the injury is 'generalized harm' to the State as a whole," as well as harm to numerous individual Mississippi consumers). Yet the Fifth Circuit held that the State was "*not* the sole party in interest" and that individual citizens who purchased LCD products within Mississippi were also real parties in interest. *Id.* (emphasis in original). But this "sole party in interest" standard is contrary to this Court's instruction that federal courts look to the "gravamen" of the complaint as a whole. *See Georgia*, 324 U.S. at 452.

As demonstrated above, the Attorney General has been charged by statute and is permitted by

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[17] *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938) (holding that "the State must show a direct interest of its own and *not merely* seek recovery for the benefit of individuals who are the real parties in interest" (emphasis added)); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911) (state held to be nominal party for purposes of federal jurisdiction where it did not seek to protect its own property or any other interest, but sought "*only* to vindicate the wrongs of *some* of its people" (emphasis added)); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901) (unnamed party is real party in interest "when the relief sought is that which inures *to it alone*" (emphasis added)).

common law to seek restitution to the State, civil penalties, and injunctive relief for antitrust violations and deceptive pricing, in the name of the State as *parens patriae*. There is nothing "unacceptable" about invoking that power. Therefore, under this Court's precedent, Mississippi is entitled to sue as the sole plaintiff without being removed to federal court. Mississippi seeks injunctive relief for the whole State, civil penalties to be paid to the State, and restitution calculated based on far-reaching consumer and proprietary injuries to the State. Further, Mississippi prosecutes this lawsuit in its own name, and controls the litigation apart from any individual citizens.

The Fifth Circuit's judgment has improperly expanded federal jurisdiction.

C. Strict construction of removal statutes

1. Removal statutes generally

This Court has long held that statutory procedures for removal must be strictly construed. Where there is any doubt about the reach of a removal statute, this Court has firmly established that any doubts must be resolved against removal. A presumption against removal comports with the broader principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal subject-matter jurisdiction "is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). "The dominant note" in the approach to diversity

jurisdiction" is "jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (citation omitted).

This Court has explained that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal legislation]. . . . 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108–09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002). Hence, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("[W]e should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.").

2. Removal under CAFA

The strict construction rule has not been altered by CAFA. In *Hertz Corp. v. Friend*, this Court confirmed that, in the CAFA context, the "burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it." 130 S. Ct. 1181, 1194 (2010) (citing *Kokkonen*, 511 U.S. at 377; *McNutt v. Gen. Motors*

Acceptance Corp. of Ind., Inc., 298 U.S. 178, 189 (1936)). Therefore, for a *parens patriae* action to be removable under CAFA, Defendants must show that the statute being strictly construed authorizes such removal.

Nothing in the language of CAFA either contemplates or authorizes removal of a *parens patriae* action when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. To establish diversity jurisdiction under CAFA's "mass action" provision, Defendants were required to demonstrate that the State's complaint constituted

> [a] civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the *plaintiffs'* claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)].

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

Congress's use of the word "plaintiffs" demonstrates that a mass action refers to an action where individually injured persons lend their names, as *parties*, to a complaint. CAFA provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)," i.e., greater than $75,000 for each individual person. This language is additional confirmation that the group of "100" must comprise actual, named "plaintiffs."

The Fifth Circuit's interpretation would improperly conflate two separate inquiries: (1) whether the case is a mass action, and (2) whether the State is a nominal or real party in interest. The CAFA requirement that a case satisfy the "mass action" definition under § 1332(d)(11)(B)(i) is distinct from whether the State is merely a nominal party or a real party in interest for purposes of establishing diversity under § 1332(d)(2).

The Fifth Circuit's interpretation would also nullify the general public exception provided under CAFA. Strict rules of statutory construction advise that statutes should be construed so as to avoid rendering any statutory language superfluous. The general public exception provides that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)." *Id.* § 1332(d)(11)(B) (ii)(III). As the concurrence below noted, application of *Caldwell* renders this exception a nullity in the Fifth Circuit. Pet. App. at 20a.

III. The Removal Question at the Center of This Circuit Conflict Is an Important and Recurring Issue.

A. Federalism implications

Review of the Fifth Circuit's judgment is necessary to preserve deeply-rooted principles of federalism. Under our federal system, "[s]tates possess sovereignty concurrent with that of the Federal Government." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This system of dual sovereignty requires that states be treated in a manner that is consistent with their status as sovereigns and that

preserves the dignity to which they are entitled. *See Alden v. Maine*, 527 U.S. 706, 715, 748 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (emphasizing the need to "accord[] the States the respect owed them as members of the federation").

Accordingly, this Court's precedent establishes that non-consenting states are entitled to sovereign immunity from being haled into any court. *See Alden*, 527 U.S. at 718; *see also Hans v. Louisiana*, 134 U.S. 1, 12 (1890). Such sovereign immunity is far reaching, and extends to protect states that bring suit in their own state courts. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983). Considerations of comity should make federal courts "reluctant to snatch" those cases "unless some clear rule demands it." *Id.* No rule requires such an extraordinary result in this case.

State courts have "inherent authority, and are thus presumptively competent, to adjudicate claims arising *under the laws of the United States*." *Tafflin*, 493 U.S. at 458 (emphasis added). Federal courts should be most reluctant to compel removal of a state's case that involves matters of state law. Here, the claims arise under *state law*, where the particular expertise of state courts is at its height, and where federal courts are constrained by the doctrine of *Erie R. Co. v. Tompkins*. *See* 304 U.S. 64, 78 (1938). Indeed, it is "particularly desirable" for a federal court to decline to exercise jurisdiction "when the result is to permit a State court to have an opportunity to determine questions of State law." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29

(1943). State law matters are best left to state courts because they "presumably have greater expertise" over state law. *Tafflin*, 493 U.S. at 465. "To hold otherwise would . . . denigrate the respect accorded coequal sovereigns." *Id.* at 466.

Federalism also favors leaving matters of state policy to state courts in order to avoid interfering with the policy concerns of the state. For example, this Court has explained that federal courts must abstain from deciding cases that present a particularly important question of state policy due to the need to maintain "harmonious federal-state relations in a matter close to the political interests of a State." *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). This principle applies equally to CAFA. The Senate Committee Report recognized that CAFA "promotes the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." S. Rep. No. 109-14, at 57 (2005).

Here, the Attorney General filed this action in Mississippi state court, on behalf of the State, to enforce state antitrust and consumer protection laws applicable only in Mississippi. State law governs whether the Attorney General has the ability to seek the relief requested in the State's complaint. Moreover, as a matter of policy, the Mississippi legislature chose to provide the Attorney General with the power to seek that relief. Federalism favors leaving these matters to the court best equipped for interpreting Mississippi law: Mississippi state court. Nothing in CAFA provides a "clear rule" directing removal or subordinating the State's sovereign dignity.

B. Recurring jurisdictional battles and administrative complexity

The circuit conflict created by *Caldwell*'s claim-by-claim approach virtually assures extended jurisdictional battles in every *parens patriae* case filed in every circuit that has not yet addressed the issue. Defendants facing *parens patriae* actions in these circuits are consistently arguing that *Caldwell* stands for the proposition that a *parens patriae* lawsuit is removable. *See In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 602 (S.D.N.Y. 2011), *appeal denied sub nom. Purdue Pharma L.P. v. Kentucky*, 2013 WL 85918, at *7 (2d Cir. Jan. 9, 2013) (rejecting defendant's invitation to adopt the *Caldwell* approach to the class action provision); *Colorado Civil Rights Comm'n v. Wells Fargo Bank & Co.*, 2011 WL 2610205, at *3–5 (D. Colo. July 1, 2011) (rejecting defendant's invitation to adopt the claim-by-claim approach in determining the real party in interest); *Connecticut v. Moody's Corp.*, 2011 WL 63905, at *2–3 (D. Conn. Jan. 5, 2011) (rejecting defendant's invitation to adopt *Caldwell*'s real party in interest analysis); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010) (applying the *Caldwell* approach); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010) (rejecting defendants' invitation to adopt the *Caldwell* approach).

Further, the claim-by-claim approach raises more questions than it answers. The *Caldwell* decision itself foreshadowed the complexity which results from applying its test. In *Caldwell*, the court ordered that unnamed consumers be added as plaintiffs, leaving how to accomplish this feat of joinder to the "well-able hands" of the district court.

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008). The dissent noted that the majority was essentially ordering the case to be "deformed." *Id.* at 432 (Southwick, J., dissenting).

Indeed, the only two district court judges in the Fifth Circuit to apply *Caldwell*, including the district court below, have highlighted the administrative, jurisdictional, and logistical complexities the decision creates. These district court judges' explicit acknowledgement of the hurdles imposed by the Fifth Circuit approach is further proof that CAFA jurisdiction was not intended to be expanded to sweep *parens patriae* actions into federal court under the rubric that they are mass actions.[18]

In *Entergy*, the district court, noting that it was "duty-bound" to follow *Caldwell*, ruled that a *parens patriae* action brought by the state was a mass action under CAFA. *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, No. 3:08cv780, 2012 WL 3704935, at *16 n.6 (S.D. Miss. Aug. 25, 2012). The court enumerated some of the difficulties this

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[18] Application of the *Caldwell* claim-by-claim test will without question result in the vast majority of *parens patriae* cases brought in the Fifth Circuit being removed to federal court. The test itself essentially dictates this outcome, as it is unlikely that a quasi-sovereign interest could be based on injury to fewer than 100 citizens. Almost all *parens patriae* lawsuits include at least one claim that seeks some kind of restitution on behalf of the state's consumers. *See* Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 140 (2011). Hence, lawsuits that had previously been considered quintessentially state court matters will all be transformed into federal cases. There is no evidence in the language of CAFA demonstrating that it was intended to trample on States' sovereign dignity in this way.

entailed: "[a] key challenge in applying the *Caldwell* rationale to *parens patriae* lawsuits" is that it requires the district court to "not only rewrite the plaintiff's complaint but to force the plaintiff to recruit or name parties not initially in the lawsuit." *Id.* (citing *Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting)). The court also noted that the claim-by-claim analysis leads to "awkward litigation gymnastics" when applied to *parens patriae* actions brought by individual attorneys general and removed under CAFA. *Id.*

These "awkward litigation gymnastics" were presaged by the district court below. Although finding this case was a mass action under *Caldwell*, the district court nonetheless remanded this case pursuant to CAFA's general public exception. Pet. App. at 52a. In a section entitled "The Future of this Case," the district court set forth its understanding of what the law would require if the Fifth Circuit were to reverse its remand order. *Id.* at 52a–56a.

First, the district court anticipated that if the case remained in federal court as a mass action, the injunctive relief, civil penalty claims, and restitution claims for individuals with losses less than or equal to $75,000 would be severed. This severance would be in accordance with CAFA's mandate that federal jurisdiction only extends to those plaintiffs in a CAFA mass action whose claims satisfy the $75,000 jurisdictional amount. *Id.* at 52a–53a. The district court certified that guidance from the Fifth Circuit on this issue would help the case proceed if the case remained in federal court.

The district court also sought guidance on whether or not the part of the case that remained in federal court could be transferred to the pending

MDL. *See id.* 55a-56a. CAFA bars transfer of a mass action to another court unless the majority of the plaintiffs consent. 28 U.S.C. § 1332(d)(11)(C)(i). But there is no mechanism through which a majority of Mississippi consumers, who would be deemed to be the real parties in interest—although not plaintiffs—could consent to transfer. Neither the majority opinion nor the concurrence provided guidance on these issues.

The Fifth Circuit's mandate that, in every *parens patriae* lawsuit, the pleadings must be pierced and the complaint dissected claim-by-claim to deduce the true nature of the proceedings, to see if the attorney general is acting, in effect, as a class representative, is at odds with this Court's admonition that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). According to this Court:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.

Id. (citation omitted).

Under the Fifth Circuit's claim-by-claim test, enormous time, expense, and judicial resources will be expended determining whether, despite the presence of only one plaintiff, persons other than the State may benefit from the State's lawsuit and

therefore must be found and added as plaintiffs, thereby completely reforming the nature of the lawsuit.

This Court has instructed that jurisdictional statutes must be interpreted to promote administrative simplicity. The Fifth Circuit's approach burdens the federal judiciary and runs afoul of that goal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals,

Fifth Circuit.

State of MISSISSIPPI, ex rel. Jim HOOD, Attorney General, Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated, Defendants - Appellants.

No. 12-60704.

Nov. 21, 2012.

Before JOLLY, CLEMENT and ELROD, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Appellants, manufacturers and distributors of liquid crystal display ("LCD") panels, jointly removed this case to federal district court on the grounds that (1) the action was a "class action" under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(1)(B), or (2) the action was a "mass action" under the CAFA, § 1332(d)(11)(B). The State of Mississippi, Appellee, then moved to remand the case to state court, and the district court granted the motion. Because we find that the suit qualifies as a mass action under the CAFA, we find removal to be proper. Accordingly, we REVERSE the district court's remand order and REMAND for further proceedings.

I.

Ordinarily, a district court's remand order is not appealable, *see* 28 U.S.C. § 1447(d); however, there is a statutory exception to this rule that grants federal appellate courts discretionary jurisdiction to review remand orders in actions that are removed under the CAFA. *See* 28 U.S.C. § 1453(c). We review *de novo* a district court's order remanding an action that was removed pursuant to the CAFA. *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 272 (5th Cir. 2009).

II.

Under the CAFA, removal of a suit to federal court is proper if the suit qualifies as a "class action" or a "mass action." *See* 28 U.S.C. § 1453(b); 28 U.S.C. § 1332(d)(11)(A). Our analysis begins by considering whether Mississippi's suit against the LCD manufacturers qualifies as a "class action," a question that can be answered quickly in the negative. Under the

relevant provision, a class action is defined as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Because Mississippi did not bring this suit under Rule 23 or a rule of judicial procedure and because Mississippi state law explicitly prohibits class actions, *see Am. Bankers Ins. Co. of Fla. v. Booth*, 830 So. 2d 1205, 1214 (Miss. 2002) ("[T]he rule is that Mississippi does not permit class actions, even equitable class actions in chancery court."), the only question is whether the suit is brought under a state statute "similar" to Rule 23. This suit was brought under the Mississippi Consumer Protection Act ("MCPA"), Miss. Code Ann. § 75-24-1 *et seq.*, and the Mississippi Antitrust Act ("MAA"), Miss. Code Ann. § 75-21-1 *et seq.* The MCPA explicitly forbids class actions, *see* Miss. Code Ann. § 75-24-15(4), and the MAA does not require that suits brought by the State satisfy any requirements that resemble the adequacy, numerosity, commonality, and typicality requirements of class action lawsuits under Rule 23, *see* Miss. Code Ann. § 75-21-7. It is thus clear that neither the MCPA nor the MAA, the statutes under which Mississippi brings the present suit, are "similar" to Rule 23. Accordingly, we hold that the district court did not err in finding that the suit does not qualify as a "class action" under the CAFA.

III.

This conclusion brings us to the more difficult question: whether this suit qualifies as a "mass action" under the CAFA. Under the terms of the statute, a mass action is defined as a civil action in which (1) monetary relief claims of (2) 100 or more persons

(3) are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact and (4) include an amount in controversy exceeding $75,000. 28 U.S.C. § 1332(d)(11)(B)(i). It is undisputed that the present suit involves "monetary relief" claims, *see* Compl. 54, ¶¶ 2, 3, and that the relief sought satisfies the amount in controversy requirement. Therefore, the decisive question is whether the suit involves the claims of "100 or more persons." If so, the suit is a mass action, and removal is proper.

In *Louisiana ex rel. Caldwell v. Allstate Insurance Company*, we first considered the application of the mass action provision to a suit filed by a state attorney general on behalf of a subset of injured citizens. 536 F.3d 418, 429–30 (5th Cir. 2008). *Caldwell* instructs us to pierce the pleadings and look at the real nature of a state's claims so as to prevent jurisdictional gamesmanship. *See id.* at 424–25, 429 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach . . . . This court has recognized that defendants may pierce the pleadings to show that the claim has been fraudulently pleaded to prevent removal." (citations and inset quotation marks omitted)). The *Caldwell* claim-by-claim approach contrasts with other circuits that look to a state's complaint "as a whole" and then subjectively determine if the state alone is the real party in interest. *See, e.g.*, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011). *Caldwell*, binding precedent on this court, effectively defined "persons" in the mass action context to be the real parties in interest

as to the respective claims. *See Caldwell*, 536 F.3d at 424–25, 429. We follow its approach.

The real parties in interest in Mississippi's suit are those more than 100 persons who, "by substantive law, possess[ ] the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980) (inset quotations omitted); Charles Alan Wright & Mary Kay Lane, LAW OF FEDERAL COURTS 492 (6th ed. 2002). We find that the real parties in interest are numerous – far in excess of 100. Contrary to the State's assertions, Mississippi is thus *not* the sole party in interest. Instead, the State (as a purchaser of LCD products) *and* individual citizens who purchased the products within Mississippi possess "rights sought to be enforced." We have several bases for this conclusion.

First, the complaint: When the State sued the LCD manufacturers, its claim was that the manufacturers had engaged in a conspiracy to fix prices for LCD panels and that their conduct artificially inflated prices, which harmed the consumers who were forced to pay higher prices. In its complaint, the State includes a series of diverse statements about the nature of the injury involved. At times, it seems to be arguing the injury is "generalized harm" to the State as a whole. *See* Compl. 2, ¶ 1 ("[T]he State of Mississippi has a quasi-sovereign interest in the direct and indirect effect of defendants' illegal conspiracy on the state's economy and the citizens' economic condition."); Compl. 51, ¶ 194(g) ("The economy of the state of Mississippi has been damaged."). At other times, the Complaint indicates the injury it seeks to remedy with money damages is the injury suffered by the purchaser consumer. *See* Compl. 38, ¶ 145 ("Defendants' conspiracy to raise . . . the price of LCD

panels at artificial levels resulted in harm to Plaintiff *and other indirect-purchaser consumers in Mississippi* . . .") (emphasis added); Compl. 44, ¶ 169 ("[D]efen- dants have passed through . . . to *their customers* 100% of the supra-competitive price increases that resulted from the defendants' conspiracy . . . ") (emphasis added); Compl. 51, ¶ 194(f) ("Plaintiff *and other Mississippi indirect purchasers* have paid supra-competitive, artificially inflated prices for LCD products.") (emphasis added); Compl. 54, ¶ 3 (Plaintiff is bringing this action "*on behalf of Mississippi residents* . ") (emphasis added). We think the variety of allegations demonstrate that the real parties in interest include not only the State, but also individual consumers residing in Mississippi.

Second, the state statutes: Neither the MCPA nor the MAA, the statutory bases of the State's suit, give the State sole authority to recover for particularized injuries suffered by consumers. The MCPA gives the State authority to seek injunctive relief and civil penalties, *see* Miss. Code Ann. §§ 75-24-9; 75-24-19(1)(b), and may indeed be interpreted as giving the State authority to seek restitution for its own injury, *see* Miss. Code Ann. § 75-24-11. However, no provision of the MCPA gives the State authority to enforce claims for injuries *suffered by others*. In other words, the statute does not authorize public collection of private damages. Similarly, the MAA allows the State to sue for injunctive relief and civil penalties, *see* Miss. Code Ann. §§ 75-21-1; 75-21-7, but not for restitution for injuries suffered by parties other than the State, *see* §§ 75-21-9; 75-21-37. To be sure, there is one unpublished Mississippi state case (from a chancery trial court) that lends support, under § 75-24-11, for the proposition that a court may "restore" damages to an individual for a particularized

injury, and also to the state on the basis of some generalized harm. *See Miss. ex rel. Hood v. BASF Corp.*, No. 56863, 2006 WL 308378 (Miss. Ch. Jan. 17, 2006). But even if *BASF Corporation* were a more authoritative precedent, it cannot be denied that the case before us is distinguishable; the crucial question before us was not dealt with by the *BASF Corporation* court – namely, who are the real parties in interest? Our case involves generalized and individual harms, which demonstrate the real parties in interest are both the State and consumers. In short, *BASF Corporation* does not provide the State with the power it seeks to assert "ownership" over all individualized claims in the name of the State.

Third and finally, common law *parens patriae* authority: Even assuming *arguendo* that the State has *parens patriae* standing to bring the claims here (an issue that we do not decide), that standing does not change the fact that Mississippi is acting, not in its *parens patriae* capacity, but essentially as a class representative. Although the relevant statutory provision does not appear on the face of the complaint, we note that Mississippi law gives the state attorney general "powers at common law." Miss. Code Ann. § 7-5-1. The State argues that *parens patriae* authority under common law allows the attorney general to bring the current suit, which, as we have seen, involves alleged state injury based on harm suffered by individual claimants. This argument fails to account for the precise nature of the injury in this case and thus also fails to establish the State as the sole party in interest. As a general background principle, *Caldwell* reminds us that there are limitations on states' *parens patriae* authority. 536 F.3d at 425–28 ("[I]t is clear that . . . there are some limitations [on *parens patriae* actions], particularly when a state is

seeking to recover damages for alleged injuries to its economy."). The Supreme Court, for example, has stated that when a state pursues the interests of a private party, the state is not asserting its sovereign interest, and the state remains only a nominal party. *Snapp v. Puerto Rico*, 458 U.S. 592, 602 (1982). That directive may apply here, where Mississippi is pursuing the interests of LCD purchasers. And even ignoring the Supreme Court and *Caldwell*'s caveats regarding the over-extension of *parens patriae* to suits to which that concept should not attach, two additional considerations demonstrate that the State is not the sole party in interest.

Mississippi law clearly prohibits double recovery for the same harm to respective class members. *See City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 711 (Miss. 2005). Thus, the state cannot recover for the injury to the consumers and still preserve the right of the consumers to recover, a right that the consumers clearly have under the statutes pursuant to which the suit is brought. *See* Miss. Code Ann. §§ 75-24-15; 75-21-9. In short, we have been directed to no statutory or common law that permits the State to extinguish the right and remedy the consumer has for his injury. There is, finally, the all too troubling suggestion by the plaintiff that Mississippi could obtain restoration for harm to individual citizens, yet keep that money for itself. We think that consideration, coupled with the reasons provided above, is enough to find against the State having *carte blanche* to recover for others' injuries under common law *parens patriae* authority.

After analyzing the complaint, the relevant statutes, and the *parens patriae* authority of the State, we hold that the real parties in interest in this suit include both the State and individual consumers of

LCD products. Because it is undisputed that there are more than 100 consumers, we find that there are more than 100 claims at issue in this case. The suit therefore meets the CAFA definition of a "mass action." *See* 28 U.S.C. § 1332(d)(11)(B)(i).

IV.

This conclusion alone, however, does not yield a final result. The CAFA contains a number of disqualifying exceptions to the term "mass action." Of these, the "general public" exception is relevant here. It provides that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). But this public exception does not exempt this case from the CAFA and federal jurisdiction. The requirement that "all of the claims" be asserted on behalf of the public is not met here. As discussed above, individual consumers, in addition to the State, are real parties in interest, so there is no way that "all of the claims" are "asserted on behalf of the general public." *Accord Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, No. 3:08cv780, 2012 WL 3704935, at *15 (S.D. Miss. Aug. 25, 2012) (A "finding that the State has brought [an] action in its representative capacity to recoup restitution for individual[s] . . . precludes application of the general public exception.").

We do, however, acknowledge the concern that finding the general public exception inapplicable here may render such statutory exception a dead letter (because finding a suit to be a mass action negates the possibility of the exception applying), and we

welcome congressional clarification of this issue.[1] Nevertheless, the argument that our finding vitiates the application of the exception must yield to our responsibility to apply the unambiguous, express language of a statute as written. *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998). Here, doing precisely that (i.e., finding a suit to be a mass action because "monetary relief claims of 100 or more persons" are at issue) precludes us from finding that the general public exception applies.

V.

At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court). *See generally, Waltzing through a Loophole: How Parens Patriae*

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[1] The general public exception here, in the development of the law, has become somewhat problematical in the sense it reflects statutory surplusage when the State brings consumer-related actions such as the one before us today. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (1st ed. 2012) (discussing the "surplusage canon" of construction, which provides that "[i]f possible, every word and every provision is to be given effect . . . . None should be ignored. None should be given an interpretation that causes it . . to have no consequence" (emphasis added)). If a court such as ours decides that the case must be considered on a "claim-by-claim" basis and is, therefore, a mass action, it has necessarily decided that not *all* of the claims are claims of the State and the public exception has no relevance. On the other hand, if, as other circuits have held, these cases' complaints should be evaluated "as a whole," and not on a "claim-by-claim" basis, such a decision means that the case is not a mass action because the State is the sole party in interest. Consequently, the public exception has no application. Thus, under either scenario, the public exception becomes statutory surplusage.

Suits Allow Circumvention of the Class Action Fairness Act, 83 U. COLO. L. REV. 549 (2012). Because this suit is a mass action under the terms of the CAFA, removal is proper.[2]

The judgment of the district court is therefore REVERSED, and the case is REMANDED for further proceedings.

REVERSED and REMANDED.

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[2] Nothing we have said denies the State of Mississippi the right to proceed with this case. It will simply proceed in federal, not state, court.

JENNIFER WALKER ELROD, Circuit Judge, concurring in the judgment:

I concur in the judgment because the majority opinion is a fair application of our binding precedent, namely *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008). I write separately, however, to express my concerns with *Caldwell*. *Caldwell*'s claim-by-claim approach is problematic when applied to CAFA's "mass action" provision in *parens patriae* suits such as the instant case.[1] Moreover, and just as troubling, applying *Caldwell*'s reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law.

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[1] I disagree with the majority opinion's veiled assertion that this may not be a *parens patriae* suit because "Mississippi is pursuing the interests of LCD purchasers." In its complaint, Mississippi identified a valid quasi-sovereign interest in preventing illegal antitrust conduct prohibited under MAA and MCPA. The facts in Mississippi's complaint also show that it sought restitution based, at least in part, on generalized harm to the Mississippi economy caused by Appellants' price-fixing scheme. The LCD consumers may be real parties in interest under *Caldwell*'s approach but that does not eviscerate Mississippi's asserted quasi-sovereign interest in the restitution claim. Moreover, the caveats to *parens patriae* authority that the majority opinion references apply only when the state is a nominal party in interest. The majority opinion never states that Mississippi is merely a nominal party in interest; to the contrary, it recognizes that "the real parties in interest in this suit include both the State and individual consumers of LCD products." Furthermore, unlike in *Caldwell*, where the damages were to go to specific policyholders, Mississippi asserted both in its complaint and at oral argument that it would retain any restitution damages.

We have jurisdiction over this case only if it is a "class action" or a "mass action" under CAFA. For the reasons stated in the majority opinion, this is not a "class action." The central issue, then, is whether Mississippi's lawsuit is a "mass action." CAFA defines that term as:

> [A]ny civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdiction amount requirement under [28 U.S.C. § 1332(a)].

28 U.S.C. § 1332(d)(11)(B)(i). In *Caldwell*, we considered the application of this provision to a *parens patriae* suit.

As the majority opinion explains, *Caldwell* essentially defined "persons" in the mass action context as the real parties in interest with respect to each claim in the suit. *See* 536 F.3d at 424, 429. In that case, Louisiana sued several insurance companies for conspiring to suppress competition and sought, among other things, treble damages on behalf of its citizens. *Id.* at 422–23. The defendants removed the case to federal court, "argu[ing] that although labeled *parens patriae*, th[e] case [was] in substance and fact a . . 'mass action'" under CAFA. *Id.* at 423. We evaluated Louisiana's suit on a claim-by-claim basis, rather than as a whole. *Id.* at 429–30. Using this approach, we concluded that Louisiana consumers were the real parties in interest with respect to the treble damages claim; therefore, the suit involved the monetary claims of 100 or more persons and (because

it also met the other statutory requirements) was a mass action. *Id.*

Here, as the majority opinion shows, applying the claim-by-claim approach leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim, so this is a "mass action" under CAFA.[2] This result is the exact opposite of the outcome in many other similar law-

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[2] The majority opinion reaches this result using the claim-by-claim approach from *Caldwell*, but there are notable differences between Louisiana's claims in *Caldwell* and Mississippi's claims here. In *Caldwell*, Louisiana sued under the Louisiana Monopolies Act, which provided that "*any person* who is injured in his business or property" under the Monopolies Act "shall recover[ ] [treble] damages." 536 F.3d at 429 (emphasis added) (quoting La. Rev. Stat. § 51:137). Because the Louisiana statute contemplated individual enforcement, the court reasoned that "the policyholders, and not the State, [were] the real parties in interest." *Id.* (citation omitted); *see also id.* at 430 (concluding that there was "no reason to believe" that the policyholders were not the real parties in interest "given that the purpose of antitrust treble damages provisions [is] to encourage private lawsuits by aggrieved individuals for injuries to their businesses or property") (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). Here, Mississippi sued under MAA and MCPA, which specifically authorize the Attorney General to sue on behalf of the general public for violations of the respective statutes. *See* Miss. Code Ann. § 75-21-37 (providing direct statutory authority for Mississippi "to enforce civil features of the antitrust laws at law or in equity"); *id.* § 75-24-19(1)(b) (giving the attorney general direct statutory authority "[to] recover on behalf of a state a civil penalty in a sum not to exceed [$10,000] per violation"). In addition, the Mississippi Attorney General has "the powers of the Attorney General at common law." *Id.* § 7-5-1. Those powers include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights." *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648, 649 (Miss. 1973) (citations omitted). Simply put, this case turns on different facts and law than did *Caldwell*.

suits around the country.[3] That so many other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that we should consider whether we have staked out the correct position. I believe we have not.

I.

As an initial matter, I agree with Judge Southwick's dissenting opinion in *Caldwell*. Judge Southwick would have ordered remand of Louisiana's suit to state court because its complaint did not "on its face" present a class or mass action. *Caldwell*, 536

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[3] Several other states' attorneys general and private plaintiffs filed actions against the makers of LCD flat panels based on the same alleged conduct that forms the basis for this suit. *See, e.g., LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845 (N.D. Ill. 2011); *South Carolina v. AU Optronics Corp.*, No. 3:11-CV-731, 2011 WL 4344079 (D.S.C. Sept. 14, 2011). These cases essentially fall into two groups. Some were transferred to an MDL court in the Northern District of California. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2011 WL 560593, at *1 (N.D. Cal. Feb. 15, 2011). Others, however, remained in the district courts to which they were removed—these cases were first filed in state court and involved states' attorneys general asserting only state law claims against the LCD defendants. *See, e.g., South Carolina*, 2011 WL 4344079, at *2. The MDL court handling the first group of cases has examined states' interests in the actions "as a whole" when deciding real-party-in-interest questions. *See In re TFT-LCD*, 2011 WL 560593, at *3–4. The district courts dealing with the second set of cases have done the same, consistently remanding *parens patriae* suits back to state court. *See, e.g., Illinois*, 794 F. Supp. 2d at 859; *South Carolina*, 2011 WL 4344079, at *2. *But see Mississippi ex rel. Hood v. Entergy Miss., Inc.*, No. 3:08-CV-780, 2012 WL 3704935, at *15 (S.D. Miss. Aug. 25, 2012) at *7 n.6 (following *Caldwell* because it believed it was "duty bound" to do so).

F.3d at 436 (Southwick, J., dissenting). In reaching that conclusion, Judge Southwick acknowledged two important principles: (1) "the plaintiff is the master of his complaint," and (2) "[d]oubts about propriety of removal are resolved in favor of remand." *Id.* at 433 (citations omitted). Consistent with these principles, "when we decide whether a suit is removable under CAFA, we should determine what the case is, not what it must be if all the relief requested is to be part of the litigation." *Id.* at 432–33. Of course, this view did not carry the day in *Caldwell*, but the development of case law outside this circuit since then suggests that we should take another look.

Consistent with Judge Southwick's dissent, almost every court that has independently considered *Caldwell*'s claim-by-claim approach has either questioned or disagreed with it.[4] Indeed, every court of appeals to address the issue since *Caldwell* has rejected its approach. *See AU Optronics Corp. v. South Carolina*, ___F.3d___, Nos. 11–254 & 11–255, 2012 WL 5265799, at *6 (4 th Cir. Oct. 25, 2012) (slip. op.) (adopting "the whole-case approach and rejecting the claim-by-claim approach"); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012) (acknowledging the court's adoption of "the approach of looking at the case as a whole to determine the real party

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[4] *See, e.g.*, cases cited *supra* n.2. Courts in other contexts (*i.e.*, non-LCD cases) have also disagreed with *Caldwell*'s approach. *See, e.g., West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 997–98 (S.D. W. Va. 2012); *Connecticut v. Moody's Corp.*, No. 3:10-CV-546, 2011 WL 63905, at *2–3 (D. Conn. Jan. 5, 2011); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 945–46 (E.D. Mo. 2010); *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009). *But see West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449–50 (E.D. Penn. 2010) (concluding that *Caldwell*'s framework is consistent with CAFA's goals).

in interest, rather than the claim-by-claim approach adopted in *Caldwell*"); *Madigan*, 665 F.3d at 773–74 (referencing the courts that have questioned *Caldwell*'s analysis and holding that an action was not a removable "mass action" under CAFA, even if the state was not a real party in interest for damages claims). Each of these decisions includes convincing reasons to discard the claim-by-claim approach, a few of which I discuss here.

First, the claim-by-claim approach does not find a foothold in CAFA's text. The *Caldwell* court resorted to CAFA's legislative history to rationalize its approach. 536 F.3d at 424; *see Madigan*, 665 F.3d at 773 (reasoning that *Caldwell* "did not adopt the claim-by-claim approach based on any language in CAFA itself, nor is there any such language to be found"). Perhaps that is because CAFA's text does not suggest that, in a case in which a single plaintiff brings suit, a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief. This court has repeatedly cautioned against considering legislative history unless the text of a statute is ambiguous.[5] *See, e.g.*, *Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 518–19 (5th Cir. 2004); *see also Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) ("Congress's 'authoritative statement is the statutory text, not the legislative history.'") (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citations omitted)). There is no ambiguity here. Moreover, even assuming *arguendo* that the legislative

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[5] I have previously expressed that I generally eschew the use of legislative history to determine a statute's intent. *See, e.g.*, *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 675 F.3d 802, 829 n.4 (5th Cir. 2012) *reh'g en banc granted*, 688 F.3d 801 (5th Cir. 2012).

development of CAFA were relevant, the *Caldwell* court acknowledged that CAFA's history reveals conflicting expressions of intent. *See* 536 F.3d at 424 n.4; *see also Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752–54 (D.N.J. 2005) (discussing CAFA's legislative history and concluding that Congress did not intend to encroach on the ability of states' attorneys general to bring *parens patriae* actions).

Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be "strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). This rule undermines the argument that a case is removable under CAFA even though it does not on its face satisfy the statute's requirements. *See Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting). Furthermore, the rule should apply with particular force when the plaintiff is a state that sued in its own courts. Removing such a case to federal court implicates important principles of federalism, and "considerations of comity [should] make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983); *see also West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761, 181 (2011) ("While it is true that West Virginia voluntarily entered into its own courts to enforce its laws, it did not voluntarily consent to removal of its case to a federal court, and a federal court should be most reluctant to compel such removal, reserving its constitutional supremacy only for when removal serves an overriding federal interest.").

Finally, the impetus for *Caldwell*'s procedure to pierce the pleadings and look to the nature of each claim for relief—instead of considering the essential nature and effect of the proceedings—does not provide a compelling basis to persist with that approach. At the outset of its opinion, the *Caldwell* court recognized that "Louisiana did not raise any objections to [the district court's] decision to pierce the pleadings *or [its] procedure for doing so* . . . As such, that issue [was] waived." *Caldwell*, 536 F.3d at 425 (emphasis added). Therefore, while the *Caldwell* court referenced the proposition that "federal courts look to the substance of the action" when determining jurisdiction, *id.* at 424 (citations omitted), the court did not consider different methods for evaluating the substance (*e.g.*, "as a whole," as other circuits have done). The procedure stemming from the waived argument in *Caldwell* does not withstand the persuasive force of the analysis in the subsequent decisions rejecting it.

II.

Beyond the problems of using the claim-by-claim approach for the mass action analysis, I am also concerned that its application to CAFA's general public exception will negate the exception altogether in this circuit.

CAFA tells us not only what a "mass action" *is*, but also what it is *not*. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(I)–(IV). Specifically, the general public exception provides:

> [T]he term "mass action" shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or

members of a purported class) pursuant to a State statute specifically authorizing such action.

28 U.S.C. § 1332(d)(11)(B)(ii)(III). The majority opinion implicitly concludes that *Caldwell*'s approach also governs our analysis of this exception. If that is correct, then there is no question that the exception does not apply in this case because, as the majority opinion states, "there is no way that 'all of the claims' are 'asserted on behalf of the general public.'" This result is troublesome.

If we deny the applicability of the general public exception when individual consumers are parties in interest, then, as a practical matter, we will have eliminated the exception in this circuit. *Caldwell* specifies that a case is a mass action if more than 100 persons are the real parties in interest as to *any* claim for relief; and pursuant to CAFA's plain text, the general public exception cannot apply *unless* the case is a mass action. Under this framework, it is difficult to imagine a case that could be a mass action that also falls within the general public exception. *See, e.g.*, *Entergy Miss.*, 2012 WL 3704935, at *7 n.6, *15 (following *Caldwell* and concluding that the general public exception could not apply because "[e]ven if the State has a quasi-sovereign interest in protecting Mississippi consumers . . . the presence of the discrete group of [citizens] who have a substantive legal right to receive restitution . . . means that 'all of the claims in the action' are not asserted on behalf of the general public"). In essence, our precedent has created a situation in which a case cannot satisfy the criteria of both the mass action provision and the general public exception.[6]

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[6] I note some commentary consistent with this concern. *See* Dwight R. Carswell, Comment, *CAFA and* Parens Patriae *Ac-*

The majority opinion states that this concern "must yield to our responsibility to apply the unambiguous, express language of a statute as written," but that misses the point. It is not CAFA's plain text that causes the problem, but rather our approach in applying the text. But for the claim-by-claim approach, we could give effect to both the mass action provision and the general public exception.[7] In CAFA, Congress defined a category of cases that are mass actions and explicitly specified that certain cases "shall not" be included in that category. Our approach in applying the statute has essentially eliminated the latter provision, contrary to well-established canons of construction that counsel against interpretations that render parts of a statute

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tions, 78 U. Chi. L. Rev. 345, 370 (2011) (recognizing that "[l]awsuits that seek only injunctive relief or money that will go to the state treasury rather than to state citizens are not mass actions as defined by CAFA. Thus, it does not make sense to argue that these are the only lawsuits that will fall within the mass action exception.").

[7] The majority opinion also suggests that the general public exception is statutory surplasage under any analysis. In making that assertion, the majority opinion conflates the definition of "persons" in the mass action provision with "claimants" and "members of a purported class" in the general public exception. *See Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981) (recognizing the "well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect," and holding that a "claimant" under one provision was not an "applicant or grantee" within the meaning of another provision (citation omitted)); *cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707–08 (2012) (holding that the term "individual" in the Torture Victim Protection Act meant "natural person," but reiterating that courts should "respect Congress' decision to use different terms to describe different categories of people or things" (citation omitted)).

meaningless. *See, e.g.*, *White v. Black*, 190 F.3d 366, 368 (5th Cir. 1999) (citation omitted) (explaining that we must "give words their ordinary meaning and . . . not render as meaningless the language of a statute"); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (1st ed. 2012) (discussing the "surplusage canon" of construction, which provides that "[i]f possible. every word and every provision is to be given effect . . . . None should be ignored. *None should be given an interpretation that causes it . . . to have no consequence.*" (emphasis added)). Therefore, we should reconsider *Caldwell*'s approach to ensure that every facet of CAFA may be given effect in our circuit.

III.

I concur in the judgment because the majority opinion is a fair application of our precedent in this challenging context. For the reasons above, however, we should reconsider that precedent and adopt a different approach for analyzing the removal of *parens patriae* suits under CAFA.

APPENDIX B

United States District Court,

S.D. Mississippi,

Jackson Division.

State of MISSISSIPPI ex rel. Jim HOOD, Attorney General, Plaintiff

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Inc.; Chi Mei Corporation; Chi Me Optoelectronics Corporation; Chi Mei Optoelectronics USA, Inc.; CMO Japan Co., Ltd.; Chunghwa Picture Tubes Ltd.; Hannstar Display Corporation; Hitachi, Ltd.; Hitachi Electronic Devices (USA), Inc.; Japan Display East, Inc.; LG Display Co.; LG Display America, Inc.; Samsung Electronics Co., Ltd.; Samsung Semiconductor, Inc.; Samsung Electronics America, Inc.; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Co., Ltd.; Toshiba America Electronic Components, Inc.; Toshiba America Information Systems, Inc., Defendants.

Cause No. 3:11-CV-345-CWR-FKB.

May 3, 2012.

ORDER

CARLTON W. REEVES, District Judge.

Pending before the Court is the plaintiff's motion to remand. Docket No. 19. The defendants have responded in opposition, Docket No. 25, the plaintiff has replied, Docket No. 29, and the Court is ready to rule. The motion to remand will be granted. Also

pending is the defendants' motion to strike portions of the plaintiff's reply brief. Docket No. 30. That motion is fully briefed, *see* Docket Nos. 31 & 33, and will be granted.

I. Factual and Procedural History

On March 25, 2011, the State of Mississippi filed a complaint in the Chancery Court of Hinds County alleging that the defendants had engaged in price-fixing in violation of the Mississippi Consumer Protection Act ("MCPA"), Miss. Code § 75-24-1 *et seq.*, and the Mississippi Antitrust Act ("MAA"), *id.* § 75-21-1 *et seq.* Docket No. 1-1.

The action was brought by the Attorney General of Mississippi, who sought to protect the State's "quasi-sovereign interest" in its economy and its citizens' economic well-being. *Id.* at 3. The State claimed that the number of citizens harmed by the defendants' conduct is "a sufficiently substantial segment of the State's population to establish Mississippi's quasi-sovereign interests, as relief is sought on behalf of all local governmental entities and consumers (not limited groups of private parties) who bought a wide range of price-fixed products." *Id.* at 4. With this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens. *Id.* at 3-4.

The defendants are companies that manufactured, marketed, sold, and/or distributed LCD panels, which are components of computers, televisions, and a wide variety of other electronic devices. *Id.* at 4-9. According to the State, the defendants formed an international cartel that conspired to artificially limit the supply and increase the price of LCD panels between 1996 and 2006, thereby increasing the price of every product containing a LCD panel during that

time period. *Id.* at 3-4, 11-12, and 20. The complaint described how the defendants, who together make up over 80% of the market for LCD panels, carried out their scheme through regular meetings of high-level executives, public statements, and a tangled web of cross-licensing and cross-purchasing agreements and joint ventures. *Id.* at 11-36. As a result of these acts, when Mississippi's consumers, local governments, and state agencies purchased products containing LCD panels, they allegedly paid more than they otherwise would have, had the market been fair and competitive. *Id.* at 19 and 39-49.

It was further alleged that several of the defendants and their co-conspirators had pled guilty to criminal charges brought by the United States Department of Justice for this conduct and paid more than $890 million in criminal fines to the United States government. *Id.* at 3 and 38-39. The State claimed that none of those fines were dedicated to recompense Mississippi's consumers and governmental entities, nor were funds set aside for civil penalties owed to States under state laws. *Id.* at 3.

The State sought the following relief: (1) a permanent injunction prohibiting the defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of $10,000 per LCD panel product sold in Mississippi during the relevant time period, pursuant to the MCPA[1]; (3) civil penalties of up to $2,000 per month, per defendant for violations of the MAA during the relevant time period; (4) restitution to the State for its own losses caused by purchasing LCD

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[1] Civil penalties recovered under the MCPA are divided evenly between the Attorney General's Office of Consumer Protection and the General Fund of the State of Mississippi. Miss. Code § 75-24-19(1)(b).

panel products during the relevant time period; (5) restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant time period; (6) punitive damages; and (7) other relief including costs of court, pre- and post-judgment interest, and attorney's fees. *Id.* at 55-56.

On June 9, 2011, the defendants jointly removed the case to this Court. Docket No. 1. They asserted that federal jurisdiction was satisfied under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453. *Id.* at 4. That law establishes federal jurisdiction over certain suits determined to be "class actions" or "mass actions." 28 U.S.C. § 1332(d). The defendants further asserted that a federal question existed pursuant to the Sherman Act, 15 U.S.C. § 7 *et seq.* Docket No. 1-1, at 10.

Shortly thereafter, the United States Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring this case to the United States District Court for the Northern District of California, where Judge Illston presides over a number of other suits against LCD panel manufacturers. Docket No. 19-1; *see In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C07-1827, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011). That Order was postponed to await a decision on the motion to remand. Docket No. 24.

II. Standard of Review

"The party seeking removal bears the burden of showing that federal jurisdiction is proper." *Lone Star OB/GYN Assoc. v. Aetna Health Inc.*, 579 F.3d 525, 528 (5th Cir. 2009) (citation omitted); *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). "[B]ecause the effect of removal is to deprive the state

court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365-66 (5th Cir. 1995) (citations omitted). "The removal statute is therefore to be strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (citations omitted). "The court has wide, but not unfettered, discretion to determine what evidence to use in making its determination of jurisdiction." *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 570-71 (5th Cir. 2011) (quotation marks and citations omitted) (affirming the district court's decision to decline federal jurisdiction pursuant to a CAFA exception).

III. Discussion

The defendants claimed two independent sources of federal jurisdiction: diversity jurisdiction under CAFA and a federal question presented under the Sherman Act. Each will be evaluated below. The Court will begin, though, with a discussion of *parens patriae* actions and a summary of a significant Fifth Circuit case that addressed some of the issues presented here.

A. The Nature of These Actions

"The concept of *parens patriae* stems from the English constitutional system, where the King retained certain duties and powers, referred to as the 'royal prerogative,' which he exercised in his capacity as 'father of the country.'" *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (citation omitted); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600-02 (1982). While the term originally meant the King's power to protect those without "the legal capacity to

act for themselves," *Caldwell*, 536 F.3d at 425, in the United States *parens patriae* actions were "greatly expanded" over the 1900s, *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (collecting cases). Today they are "an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents." Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122 (2011).

Parens patriae actions are brought to protect a state's "quasi-sovereign interests," which include interests in "the health and well-being – both physical and *economic* – of its residents in general . . [and] not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607 (emphasis added). More specifically, quasi-sovereign interests have been held to include suits seeking to abate public nuisances, maintain access to energy sources, and halt price fixing[2]. *Id.* at 604-06 (collecting cases).

There are boundaries on the *parens patriae* authority. "A State is not permitted to enter a contro-

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[2] In *Hawaii v. Standard Oil*, the Supreme Court held that the Clayton Act did not permit the State of Hawaii to seek damages for its citizens via a *parens patriae* suit alleging antitrust violations. *Hawaii*, 405 U.S. at 260-62. In response, Congress passed 15 U.S.C. § 15c, which authorizes state attorneys general to sue for antitrust violations and recover damages on behalf of their citizens. *State v. Marsh & McLennan Companies*, 286 Conn. 454, 466-68 (2008); *see Caldwell*, 536 F.3d at 427 n.5; *TFT-LCD*, 2011 WL 560593, at *4 n.2. The Supreme Court has acknowledged "the long history of state common-law and statutory remedies against monopolies and unfair business practices" and concluded that "this is an area traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

versy as a nominal party in order to forward the claims of individual citizens. But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (citations omitted).[3] *Parens patriae* actions are disfavored where the injury falls "on a small group of citizens who are likely to challenge" the harm directly. *Id.* at 739. But where "a great many citizens . . . are faced with increased costs aggregating millions of dollars per year" and "cannot be expected to litigate [the issue] given that the amounts paid by each consumer are likely to be relatively small," *parens patriae* suits are appropriate. *Id.* Unsurprisingly, then, "*[p]arens patriae* statutes are most common in the antitrust and consumer protection contexts." Dwight R. Carswell, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 348 (2011)

The Supreme Court "has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Snapp*, 458 U.S. at 607. In *Snapp*, it reiterated that a state must allege "injury to a sufficiently substantial segment of its population," not just an "injury to an identifiable group of individual residents." *Id.* A district court determines the proportion of the population that has allegedly been affected by analyzing the complaint as of the date it was filed. *See Hollinger*, 654 F.3d at 573 ("Citizenship, for purposes of proving an exception to CAFA, must be analyzed as of the date the complaint or amended complaint was filed.") (citations omitted).

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[3] While *Maryland* was brought in the Supreme Court as an original action, it remains a helpful explanation of the *parens patriae* authority.

There is a debate, both in our case and in the wider legal community, over whether *parens patriae* suits are class actions brought under a different label or *sui generis*. *Parens patriae* actions are certainly a form of representative action, and "attorneys general often hire plaintiffs' lawyers to help prosecute *parens patriae* suits. . . . [T]he conceptual similarity between [class actions and *parens patriae* actions] is unavoidable." Lemann, 111 Colum. L. Rev. at 133 (citations omitted).

That said, distinctions can be identified. For one, an attorney general is not a true class representative. "Rather, in representing the citizens, the State [through its Attorney General] acts more in the capacity of trustee representing beneficiaries or a lawyer representing clients, neither of which is the type of representation essential to the representational aspect of a class action." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 176-77 (4th Cir. 2011); *see LG Display Co. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011) ("This case was brought by the Attorney General, not by a representative of a class."). The Fourth Circuit has concluded that "[a]ll class actions are representative in nature; but not all representative actions are necessarily class actions." *McGraw*, 646 F.3d at 175 n.1.

There also are procedural differences between the two. *See id.* at 175-76; *Madigan*, 665 F.3d at 772. "Unlike private litigants, the Attorneys General have statutory authority to sue in *parens patriae* and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011) (citations omitted). "Additionally, attorneys general are not always required to provide notice to

the citizens whose damages they are recovering, and the citizens may not be able to opt out." Carswell, 78 U. Chi. L. Rev. at 362. Further, in some states a *parens patriae* suit may result in a recovery for the state's General Fund but not the individual victims of the fraud. *Washington*, 659 F.3d at 848.

The Fifth Circuit has found that a *parens patriae* suit may, in certain circumstances, constitute a CAFA mass action. *Caldwell*, 536 F.3d at 430. It has recited CAFA's legislative history to conclude that "the term 'class action' should be defined broadly to prevent 'jurisdictional gamesmanship.'" *Id.* at 424. But it has not held that *parens patriae* suits are necessarily class or mass actions. *Id.* at 430.

B. The Fifth Circuit's Decision in Caldwell

Because *Caldwell* controls our case and its interpretation is contested by the parties, it will be summarized here.

In *Caldwell*, the Attorney General of Louisiana filed suit against a number of insurance companies and their business partners, claiming that they had "continuously manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums." *Id.* at 422 (quotation marks omitted). The complaint alleged that the defendants had systematically undervalued and underpaid policyholders' property claims in the aftermath of Hurricanes Katrina and Rita. *Id.* at 422-23. The suit, which was styled as a *parens patriae* action and filed in Louisiana state court, sought forfeiture of illegal profits, treble damages, and injunctive relief. *Id.* at 423.

The defendants removed the case to the United States District Court for the Eastern District of Louisiana, arguing federal jurisdiction under CAFA. *Id.*

The district court determined that the real parties in interest were the individual policyholders who had been harmed, and reasoned that the suit was "really an artfully pled class action." Transcript of Hearing at 32, *State of Louisiana v. Allstate Ins. Co.*, No. 07-9409 (E.D. La. Apr. 2, 2008) ("Caldwell Transcript"). The district court rejected the argument that the suit was a CAFA mass action. *Id.* at 21.

The Fifth Circuit affirmed on different grounds. It analyzed the complaint claim-by-claim, finding that Louisiana was a real party in interest as to the injunctive relief and that the policyholders were real parties in interest with respect to the treble damages. *Caldwell*, 536 F.3d at 429-30. As real parties in interest, the policyholders' citizenship had to be counted, and since they were Louisiana residents, there was minimal diversity of the parties as required by CAFA. *Id.* at 430. The Fifth Circuit declined to address whether the suit was a class action – the district court's rationale for federal jurisdiction – and found that it was a mass action: "a civil action involving the monetary claims of 100 or more persons that is proposed to be tried jointly." *Id.*

Judge Southwick, in dissent, concluded that the suit was neither a class action nor a mass action as CAFA defines those terms. *Id.* at 433 (Southwick, J., dissenting). The Attorney General's complaint did not invoke the federal or state class action rules, and the mass action provision could not be invoked by a defendant seeking to join additional parties. *Id.* at 434-35. Instead, Judge Southwick argued that Louisiana's courts had jurisdiction over the complaint as it was pled and should first resolve whether the Attorney General could recover treble damages on behalf of Louisiana consumers in a representative capacity. *Id.* Under the applicable standard of review,

which requires doubts and uncertainties to be resolved against a finding of federal jurisdiction, he thought the case should have been remanded. *Id.* at 433.[4]

C. The Present Dispute

1. The Class Action Fairness Act

"Congress enacted CAFA to encourage federal jurisdiction over interstate class action lawsuits of national interest." *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 797 (5th Cir. 2007). "The CAFA exceptions are 'designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state.'" *Id.* at 803 (quoting *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 682 (7th Cir. 2006)); *see McGraw*, 646 F.3d at 178 ("CAFA is also sensitive to deeply-rooted principles of federalism, reserving to the States primarily local matters.").

To establish jurisdiction under CAFA, the removing party must first show that the parties are minimally diverse, which means that:

> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

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[4] *Caldwell* was "groundbreaking," Lemann, 111 Colum. L. Rev. at 133, and has been discussed in a number of circuit and district court decisions, discussed below. It also has been the subject of academic attention, perhaps because of an emerging circuit split. *E.g.*, *id.*; Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549 (2012); Carswell, 78 U. Chi. L. Rev. at 353-57; Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875 (2010).

> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2)(A)-(C). The removing party must then prove that the action is a class action or a mass action.

A CAFA class action is "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B). A class action must have 100 or more "members of all proposed plaintiff classes" and an aggregate amount in controversy in excess of $5 million. *Id.* § 1332(d)(2), (d)(5)(B), and (d)(6).

CAFA defines a mass action as:

> any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Id. § 1332(d)(11)(B)(i). The jurisdictional amount requirement in 28 U.S.C. § 1332(a) is $75,000. *Id.* § 1332(a). Therefore, in a mass action, federal courts have jurisdiction "only" over plaintiffs whose individual claims exceed $75,000, exclusive of interest and costs. *Id.* § 1332(a) and (d)(11)(B)(i). Mass actions may not be transferred to a multidistrict litigation

court "unless a majority of the plaintiffs in the action request transfer." *Id.* § 1332(d)(11)(C)(i).

Once the removing party meets its burden to establish federal jurisdiction, the party seeking remand can attempt to prove one of CAFA's exceptions to jurisdiction. *Hollinger*, 654 F.3d at 571. One of those exceptions states that "the term 'mass action' shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii) and (d)(11)(B)(ii)(III).

2. Arguments

The State argues that when the complaint is viewed as a whole, the real party in interest is the State of Mississippi, not its citizens and local governments. Docket No. 20, at 5-7. Because the State is not a 'citizen' for purposes of diversity jurisdiction, it concludes that there is no minimal diversity. *Id.* at 5. The State next claims that the action is not a CAFA class action because it was not filed pursuant to Federal Rule of Civil Procedure 23 or an analogous state rule; in fact, Mississippi lacks a class action rule. *Id.* at 9-10. Finally, the State argues that its suit is not a mass action pursuant to an exception in CAFA denying mass action status to suits brought on behalf of the general public. *Id.* at 10-11.

The defendants agree that the State is the real party in interest as to the damages it seeks on its own behalf, civil penalties, and injunctive relief. Docket No. 25, at 6. They argue, though, that because the complaint also seeks damages for injuries incurred by Mississippi's consumers and local governments, those

consumers and local governments are also real parties in interest. *Id.* at 6-9. Because Mississippi's consumers and local governments are obviously citizens of Mississippi, and none of the defendants are citizens of Mississippi, the defendants conclude that minimal diversity is established. *Id.* The defendants next challenge the State's interpretation of "class action," claiming that this suit is one within the meaning of CAFA. *Id.* at 9-12. Finally, they argue that the suit is a mass action that does not fall into the State's claimed statutory exception, again because "individual Mississippi consumers are the real parties in interest when the State seeks to recover damages on their behalf in a representative capacity." *Id.* at 12.

In its reply, the State explains in more detail its contention that *parens patriae* actions are procedural vehicles separate and distinct from class actions. Docket No. 29, at 5-9. It again claims that mass action status should be denied because the case is brought on behalf of the general public, arguing that the products at issue "are ubiquitous in modern life and inflated prices for these products would affect nearly every single Mississippi resident." *Id.* at 12 n.6.

3. The Defendants' Motion to Strike

The State's reply brief then argues that the defendants failed to prove CAFA's amount in controversy requirements. *Id.* at 13-17. It denies that the defendants have put forward any evidence that the aggregate amount sought in the complaint exceeds $5 million and that at least one consumer or local government seeks more than $75,000. *Id.* The State claims that the defendants were required to provide such proof in their Notice of Removal. *Id.* at 14-16.

Finally, it recites that if this case is a mass action, the Court should bifurcate the suit. *Id.* at 19.

The defendants have moved to strike these arguments, claiming that these grounds were not briefed in the State's original motion to remand. Docket No. 30, at 2-3. In the alternative, the defendants ask for leave to file a sur-reply and attach affidavits to establish the amount in controversy requirements. *Id.* They have included a summary of their argument to be made in any sur-reply. *Id.* at 3-8. The State opposes the motion, Docket No. 31, and the defendants have responded, Docket No. 33. The defendants' response brief contains the affidavits they would have attached to any sur-reply. *See* Docket Nos. 33-1; 33-2; 33-3.

The defendants' motion is well-taken and will be granted. The State should have presented all of its arguments for remand in its original motion. *Kennedy v. BAE Sys. Info. Tech., Inc.*, No. 1:09-cv-254, 2011 WL 6211171, at *7 (S.D. Miss. Dec. 14, 2011) ("A reply memorandum is not the appropriate place to raise new arguments"). The State's new arguments will be stricken and the defendants are excused from proving CAFA's amount in controversy requirements. Further, for reasons that will become apparent later, the State's suggestion of bifurcation is moot.

4. Analysis

a. Minimal Diversity

The State of Mississippi is not a 'citizen' for purposes of diversity jurisdiction. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 706 (5th Cir. 2008) ("*Road Home*"). In this situation, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties

to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (citations omitted). The question is whether Mississippi's citizens and local governments are real parties in interest and must be counted for citizenship purposes.

"[T]he 'real party in interest' is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Richards v. Reed*, 611 F.2d 545, 546 n.2 (5th Cir. 1980) (quotation marks and citation omitted). Federal Rule of Civil Procedure 17 states that actions "must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). It also states, however, that executors, administrators, guardians, and parties "authorized by statute" "may sue in their own names without joining the person for whose benefit the action is brought." *Id.*; *see Proctor v. Gissendaner*, 579 F.2d 876, 880 (5th Cir. 1978).

In *Caldwell*, the property insurance policyholders who had been injured by the defendants' conduct were considered real parties in interest as to the claim for treble damages, because Louisiana law granted the policyholders the right to bring suit on their own for those damages.

> We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest. The text of § 137 of the Monopolies Act, which authorizes the recovery of treble damages, plainly states that "any person who is injured in his business or property" under the Monopolies Act "shall recover[ ] treble damages." The plain language of that provision makes clear that individuals have the right to enforce this provision. Accordingly, we agree with the

> district court and hold that under § 137 the policyholders, and not the State, are the real parties in interest.

Caldwell, 536 F.3d at 429 (brackets omitted); *see West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010) (finding that "a discrete group of Comcast's premium subscribers" were real parties in interest as to an attorney general's claim for treble damages on their behalf).

Here, the MCPA permits individuals to sue for damages incurred as a result of prohibited business practices. Miss. Code § 75-24-15(1). Before filing such an action, the consumer "must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General." *Id.* § 75-24-15(2). The MAA also permits individuals to sue when "injured or damages by a trust and combine . . . or by its effects direct or indirect." *Id.* § 75-21-9. Under *Caldwell*, Mississippi's consumers are considered real parties in interest with respect to the State's request for restitution on their behalf. *Caldwell*, 536 F.3d at 429; *accord Hood v. F. Hoffman-La Roche, Ltd.*, 639 F Supp. 2d 25, 31-33 (D.D.C. 2009).

These statutes afford local governments similar rights. The MCPA provides a remedy to "any person who purchases or leases goods or services primarily for personal, family or household purposes" who is injured by a prohibited business practice. Miss. Code § 75-24-15(1). A local government is considered a person under the law, *id.* § 75-24-3(a), and at least one state court has found that a governmental entity purchases goods for its own, "personal" uses, *id.* § 75-24-15(1). *Hood ex rel. State v. BASF Corp.*, No. 56863, 2006 WL 308378, at *12 (Miss. Ch. Jan. 17,

2006). Further, local governments have the right to sue under the MAA for "all damages of every kind sustained . . . and in addition a penalty of five hundred dollars ($500.00)." Miss. Code § 75-21-9.

As a result, the State of Mississippi, its consumers, and its local governments are all real parties in interest in this action. While the State has no citizenship for purposes of diversity jurisdiction, Mississippi's consumers and local governments are obviously citizens of Mississippi. Counting their citizenship, and seeing that no defendant is a citizen of Mississippi, CAFA's requirement of minimal diversity has been met. *See* 28 U.S.C. § 1332(d)(2)(A).

b. Class Action

This suit is not a CAFA class action because it was not brought pursuant to Federal Rule of Civil Procedure 23 or a "similar State statute or rule of judicial procedure." *Id.* § 1332(d)(1)(B). The action was not originally filed in federal court under Rule 23 and the parties agree that Mississippi has no rule permitting class actions.[5] None of the state laws under which this action was brought impose class action-like re-

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[5] To be clear, class actions are not authorized in Mississippi courts. *USF & G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 467 (Miss. 2005) ("Since there is no rule or statute which expressly or impliedly provides for class actions, we are compelled to conclude that they are not permitted in any legal proceedings in our state courts.").

The MCPA also bars class actions attempted to be brought under its auspices. Miss. Code § 75-24-15(4). "Thus, any purported class action complaint or master complaint on behalf of several plaintiffs asserting violations of Section 75-24-5 is arguably improper." Walker W. Jones, III & Jason R. Bush, *An Overview of the Mississippi Consumer Protection Act*, Mississippi Defense Lawyers Assoc. Quarterly, Winter 2006, at 12 (collecting cases).

quirements of adequacy, numerosity, commonality, or typicality, nor is the Attorney General, with his distinct duties, powers, and interests, a typical class representative. *See Madigan*, 665 F.3d at 772; *McGraw*, 646 F.3d at 174-77; *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 2012 WL 10552, at *7-8 (E.D. La. Jan. 3, 2012).

In a recent decision addressing issues much like our own, Judge Fallon of the Eastern District of Louisiana found that "Congress chose to define 'class action' not in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under." *Vioxx*, 2012 WL 10522, at *8 (citing 28 U.S.C. § 1332(d)(1)(B)). Because the Attorney General of Kentucky's *parens patriae* suit was not brought under such a federal or state statute or rule, it was remanded to Kentucky state court.[6] *Id.* Judge Fallon reasoned, "[i]f this is a formalistic outcome, it is a formalism dictated by Congress. Moreover, it is an understandable bright-line rule." *Id.* The Fifth Circuit declined to review the decision. Order, In re Vioxx Prod. Liab. Litig., No. 12-90002 (5th Cir. Feb. 24, 2012).

The defendants in our case interpret CAFA more broadly. They rely upon CAFA's legislative history to argue that "generally speaking, lawsuits that *resemble* a purported class action should be considered class actions for the purpose of applying CAFA." Docket No. 25, at 11 (brackets omitted) (quoting S. Rep. No. 109-14, at 35). But the word "resemble" is not found in 28 U.S.C. § 1332(d). That omission leads to an ongoing debate about whether the Senate Re-

[6] The defendant in *Vioxx* did not argue that the suit was a mass action. *Vioxx*, 2012 WL 10522, at *5 n.4.

port relied upon by the defendants is a reliable source to discern Congress's intent in enacting CAFA.

The Fourth Circuit has found that the Senate Report in question "was issued 10 days *after* CAFA was signed into law, and for that reason alone, it is a questionable source of congressional intent. . . *Post hoc* statements of a congressional Committee are not entitled to much weight." *McGraw*, 646 F.3d at 177 (citations, quotation marks, and brackets omitted); *see Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (same). The Second and Third Circuits declined to rely upon this Senate Report to establish CAFA's burden-shifting framework, where CAFA's text did not address burden-shifting. *Galeno*, 472 F.3d at 57-58; *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006). The Seventh Circuit also found this Senate Report problematic, reasoning that "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators – less, really, as it speaks for fewer." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *see also Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685-86 (9th Cir. 2006).

The Eleventh Circuit thought the Senate Report of greater value, observing that although it "was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006 – while that body was considering the bill." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (citation omitted). But that court used legislative history to interpret the "statutory labyrinth" of CAFA's mass action provisions, not the relatively more straightforward class action provisions. *Id.* at 1199. The Fifth Circuit has quoted the Senate Report and the language relied upon by the defendants, but

also did not address whether the suit before it was a class action. *Caldwell*, 536 F.3d at 424 and 430. Others have found "no clear answer" on the Senate Report's validity for a legislative history analysis. Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1892 (2010).

"[A] powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, because only the text of the law has been passed by Congress, not the often-contrived history." *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 518 n.6 (5th Cir.2009) (quotation marks and citations omitted). "[T]here is no reason to recite legislative history" when the statutory text is clear, in part because "as is often the case with legislative history, statements can be pulled from the record to support the contrary proposition as well." *Khalid v. Holder*, 655 F.3d 363, 371 (5th Cir. 2011) (citation omitted); *see Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 377 (5th Cir. 2009) (collecting cases).[7]

Because CAFA unambiguously defines class action, it is unnecessary to consider the legislative history on this point. This Court will apply the "understandable bright-line rule" articulated in *Vioxx*. 2012 WL 10552, at *8.

The conclusion that this suit is not a class action accords with rulings by the Fourth, Seventh, and Ninth Circuits. *Id.* at 660-64 (citing *Madigan*, 665

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[7] An opinion from the United States District Court for the District of New Jersey aptly illustrates one way in which CAFA's legislative history can be manipulated to support either party's position. *See Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752-54 (D.N.J. 2005).

F.3d at 770-72; *Washington*, 659 F.3d at 846-48[8]; and *McGraw*, 646 F.3d at 174-77); *see also Kentucky ex rel. Conway v. Daymar Learning, Inc.*, No. 4:11-cv-103, 2012 WL 1014989, *6 (W.D. Ky. Mar. 22, 2012). Nor is it in conflict with the Fifth Circuit's decision in *Caldwell*, which again did not resolve whether Louisiana's suit was a CAFA class action. *Vioxx*, 2012 WL 10552, at *5-6 and 8 (quoting *Caldwell*, 536 F.3d at 429-30).

c. Mass Action

Under *Caldwell*, this suit is a mass action. It is a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). *Caldwell* stands for the proposition that the words "persons" and "plaintiffs" in this sub-section are to be defined as "real parties in interest." Here, as there, this suit is a mass action because there are more than

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[8] *Madigan* and *Washington* involved the same issues pending before this Court: whether the attorney generals of Illinois, Washington, and California could, via *parens patriae* suit alleging antitrust violations by LCD panel makers, seek restitution, damages for their citizens, injunctive relief, and civil penalties in their own state courts. *Madigan*, 665 F.3d at 770; *Washington*, 659 F.3d at 846.

The Attorney General of South Carolina brought a similar suit in state court. The defendants removed the action to federal court for reasons akin to those argued here. The action was remanded. *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731, 2011 WL 4344079 (D.S.C. Sept. 14, 2011).

100 real parties in interest that seek a joint trial on common questions of law or fact.[9]

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[9] Although *Caldwell* forecloses it, there is a possibility that a "mass action" should be thought of as a "mass joinder." Courts apply CAFA's mass action provisions to mass joinders, and typically decline to apply the mass action provisions to suits lacking 100 named plaintiffs. *See Lowery*, 483 F.3d at 1198 ("CAFA's mass action provisions extend federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs.") (evaluating an amended complaint listing over 400 plaintiffs under CAFA's mass action provisions); *Abrego Abrego*, 443 F.3d at 678 (evaluating a complaint filed by 1,160 plaintiffs as a mass action); *Nevada v. Bank of America Corp.*, 672 F.3d 661, 672 (9th Cir. 2012) (holding that the State of Nevada's *parens patriae* suit was not removable as a mass action because the state was the real party in interest and thus "the action [fell] 99 persons short of a 'mass action'"); *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010) ("The instant cases contain fewer than 100 plaintiffs and thus are not removable under the plain language of the statute."); *Nunn v. Monsanto Co.*, No. 4:11-cv-1657, slip op. at 5 (E.D. Mo. Nov. 7, 2011) ("In order for this Court to have jurisdiction under the mass action provisions, defendants must demonstrate that there really are 100 plaintiffs."); *TFT-LCD*, 2011 WL 560593, at *8 ("courts have held that the plaintiffs in a mass action must be individually named plaintiffs with their own direct claims in order to be counted toward CAFA's 100 person requirements.") (collecting cases); *see also* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 104-05 (2009); Hittner et al., Fed. Civ. Pro. Before Trial – 5th Cir. Ed. ¶ 2:3027 (2011) (mass actions require 100 or more plaintiffs and CAFA can be avoided "by filing separate lawsuits, each involving fewer than 100 plaintiffs").

Mississippi's own history sheds some light on the issue. Because Mississippi law prohibits class actions, mass joinders became a popular work-around. *See, e.g., Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004) ("The case before us has endured seven amended complaints, and now involves the claims of 264 plaintiffs against 137 named defendants who have identified approximately 600 different employers where asbestos exposure might have taken place."). Mass join-

The State argues that a statutory exception requires remand.[10] CAFA denies federal jurisdiction to any mass action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." *Id.* § (d)(11)(B)(ii)(III). This will be referred to as the "general public exception."

Other courts have found the general public exception to exclude *parens patriae* suits from federal jurisdiction. *See Madigan*, 665 F.3d at 772 ("By the plain language of that provision, too, this case is not a mass action."); *Connecticut v. Moody's Corp.*, No. 3:10-cv-546, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011) ("Because the State is a real party in interest and sues to protect and vindicate the rights of its

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ders were arguably so popular that CAFA's drafters made them removable; at least, some lawyers have concluded as much: "The inclusion of 'mass actions' in [CAFA's] definition of 'class action' was a Congressional attempt to address notorious joinder abuses at the state level in Mississippi and other states." Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier – A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L.Q. Rep. 11, 14 (Spring-Summer 2005); *see also* S. Amy Spencer, *Once More Into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1067, 1081 (2006) (discussing the mass action provision's attempt to address "cases with claims joined under liberal West Virginia or Mississippi statutes"); 14B Charles A. Wright et al., Fed. Practice & Procedure § 3724, at 910-11 (4th ed. 2009) ("The mass actions made removable [by CAFA] typically are actions brought in states whose court systems do not provide for class actions."); Knight, 78 Fordham L. Rev. at 1878.

[10] "Indeed, [CAFA] is not complete without its exceptions." *Hollinger*, 654 F.3d at 569.

public in general under Conn. Gen. Stat. § 42–110m, this action is not a 'mass action.'"); *see also South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731, 2011 WL 4344079, at *7 (D.S.C. Sept. 14, 2011) (same).[11] Several commentators also believe this exception applies to *parens patriae* suits. *See* Marcy Hogan Greer & Paul L. Peyronnin, *The Class Action Fairness Act of 2005, in* A Practitioner's Guide to Class Actions 241, 282 (Marcy Hogan Greer, ed. 2010) ("a mass action does not include state attorney general actions"); Peter M. Cummins, *Parens Patriae Suits Filed by State AGs*, For the Defense, Feb. 2008 ("CAFA similarly offers no hope to defendants in this situation because enforcement actions filed by State AGs are specifically excluded from the statute's coverage."); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Pa. L. Rev. 1971, 1979 n.33 (2008) ("CAFA permits defendants to remove 'mass actions' (or class-action-like lawsuits) from state to federal court, but it contains an exception for *parens patriae* actions."); Antitrust Modernization Commission, Report and Recommendations 272 (2007) ("CAFA also does not apply to *parens patriae* actions by state attorneys general."); Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA, Exxon Mobil and Grable*, 8 Del. L. Rev. 157, 181 (2006).

Whether the general public exception can be invoked in the Fifth Circuit is contested. *Caldwell* determined that the State of Louisiana's suit was a

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[11] At least one court has found the exception applicable outside of the *parens patriae* context, in a case where the sole plaintiff was a citizen suing on behalf of the general public. *Breakman v. AOL LLC*, 545 F.Supp.2d 96, 100-01 (D.D.C.2008). The defendant conceded that the general public exception applied. *Id.* at 101.

mass action without addressing whether the exception applied. One possible reason for this is that the Attorney General of Louisiana failed to argue the exception to the Fifth Circuit. *See* Brief of Appellant, State of Louisiana ex rel. Caldwell v. Allstate Ins. Co., No. 08-30465, 2008 WL 7789594 (5th Cir. May 19, 2008); *see also South Carolina*, 2011 WL 4344079, at *4 (noting that the Attorney General of Louisiana waived another argument on appeal as well). The failure to brief the issue resulted in the State forfeiting any claim it had to the exception. *See United States v. Delgado*, 672 F.3d 320, 329 n.6 (5th Cir. 2012). Nor did the district court need to consider the general public exception, as it considered the suit a class action only. *See* Caldwell Transcript at 21.

With no such procedural default here, this Court will proceed to consider whether this action satisfies CAFA's general public exception.

i. "Claims . . . Asserted on Behalf of the General Public"

The exception first states that all of the claims in the suit must be asserted on behalf of the general public, not individuals or a purported class. 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The facts of *Caldwell* would not have satisfied this requirement. The State of Louisiana's claim for treble damages was brought on behalf of a limited subset of its population: those policyholders who had paid premiums to certain defendants for particular kinds of insurance policies. *See Ohio v. GMAC Mortg., LLC*, 760 F. Supp. 2d 741, 748 (N.D. Ohio 2011) (denying motion to remand *parens patriae* suit where relief sought "would benefit only a specific subset of Ohio citizens . . . and would do little to protect Ohio citizens generally").

In contrast, the complaint in our case alleges that the defendants, who control over 80% of the market for LCD panels, have substantially affected a product contained in laptops, desktop computer monitors, mobile phones, digital cameras, video cameras, televisions, motor vehicles, and other electronic devices commonly used and purchased in everyday life. Docket No. 1-1, at 4 and 17.[12] United States census data shows that during the relevant time period, computers and mobile phones were present in more than half of America's households. Docket No. 1-1, at 4 n.1.[13] The alleged price-fixing was so broad and pervasive as to affect the general public, and the State's claims in this suit are asserted on behalf of the general public. *See TFT-LCD*, 2011 WL 560593, at *5 ("In contrast to *Comcast* and *Caldwell*, where the States sued on behalf of limited groups of private parties (premium cable subscribers and insurance policyholders), here the States are suing on behalf of all consumers in their respective states who purchased a wide range of allegedly price-fixed products.").

There also are significant differences between the insurance market at issue in *Caldwell* and the electronics market here that broaden the latter's reach into the general population. The insurance industry has a paper trail documenting each agreement between insured and insurer, and more importantly,

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[12] The State further alleged that LCD panels are not minor components of those devices, claiming that LCD technology has a "virtually 100% market share for laptops and flat panel computer monitors, and at least 80% market share for flat panel TVs." Docket No. 1-1, at 14.

[13] Courts may take judicial notice of census data. *Hollinger*, 654 F.3d at 571-72 ("United States census data is an appropriate and frequent subject of judicial notice.") (citations omitted).

each insured is readily identifiable. But electronics retailers permit customers to pay with cash and do not record personally identifiable information on every transaction. It is unlikely that the defendants have records identifying every Mississippian who purchased a product containing a LCD panel between 1996 and 2006. There also is a person-to-person resale market of electronic goods that does not exist in the insurance industry, which further expands the percentage of the population affected by the violations alleged in this suit. Moreover, the sheer number of LCD panel products purchased and used by consumers – including computers, mobile phones, toys, car navigation systems, and televisions, among others – indisputably fall within the state's quasi-sovereign interest. If this collection of items did not implicate the overall economic well-being of Mississippi's citizens, then the Court would be hard pressed to find something which does.

ii. Pursuant to a "Statute Specifically Authorizing Such Action"

The second and final element of the general public exception is satisfied, as the claims in this action are brought under state statutes specifically authorizing these kinds of suits.

The Attorney General of Mississippi is generally empowered by a state law granting him "the powers of the Attorney General at common law." Miss. Code § 7-5-1; *see Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 544-45 (S.D. Miss. 2006). Under Mississippi common law, the Attorney General has the "power and authority . . . to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights." *Hood v. AstraZeneca*

Pharm., LP, 744 F. Supp. 2d 590, 595 (N.D. Miss. 2010) (citations omitted). *Parens patriae* suits to protect the State's quasi-sovereign interest in its citizens' economic well-being are a part of that common law tradition. *See* Part III.A, *infra*. A number of state and federal courts have recognized the Attorney General's *parens patriae* authority to represent Mississippi's consumers. *See BASF*, 2006 WL 308378, at *3 (collecting cases); *Microsoft*, 428 F. Supp. 2d at 544-46.

More specifically, the MCPA and the MAA provide statutory grounds for the relief sought in this suit. Under the MCPA,

> [w]henever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

Miss. Code § 75-24-9. The next section confirms that in those suits, "[t]he court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice prohibited by this chapter." *Id.* § 75-24-11. Civil penalties, investigative costs, and reasonable attorney's fees are authorized by a later section. *Id.* § 75-24-19(1)(b).

The MAA not only authorizes persons to recover damages for anti-competitive behaviors, *id.* § 75-21-9, but permits the Attorney General and the Attorney General alone to recover civil penalties for those behaviors, *id.* § 75-21-7. "This statute clearly gives the

Attorney General of the State the authority to bring suit in the name of the State for violations of Mississippi antitrust law." *Moore ex rel. State of Miss. v. Abbott Laboratories, Inc.*, 900 F. Supp. 26, 31 (S.D. Miss. 1995). Further, a Mississippi state court has found punitive damages to be available for violations of the MAA. *BASF*, 2006 WL 308378, at *11.

Taken together, these statutes authorize the Attorney General to receive all of the relief sought in the complaint. Because "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)," and are brought "pursuant to a State statute specifically authorizing such action," this suit satisfies the general public exception. 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

Having determined that this case is neither a class action nor a mass action that does not fall into a statutory exception, the case will be remanded to state court.

D. The Future of This Case

An exception to the usual law of remand permits the defendants to seek an immediate appeal. *See Road Home*, 524 F.3d at 702 n.1 (quoting 28 U.S.C. § 1453(c)(1)). Should the Fifth Circuit reverse and remand this case here as a CAFA mass action, the Court will now describe its understanding of what the law requires upon its return. All involved have an interest in there being only one appeal.

If returned here as a mass action, the case will be severed in accordance with the command of 28 U.S.C. § 1332(d)(11)(B)(i). The State's interests in permanent injunctive relief; civil penalties; restitution for losses incurred by the State in its proprietary capac-

ity; and restitution for losses incurred by individuals[14] claiming less than or equal to $75,000 each, including individual punitive damages but excluding interest and costs; will all be remanded to state court. In mass actions, federal jurisdiction extends "only" to individual claims that exceed $75,000. 28 U.S.C. § 1332(d)(11)(B)(i). This Court's supplemental jurisdiction cannot be extended to those individuals with claims under $75,000. *See Lowery*, 483 F.3d at 1206 n.51.

The defendants argue that the State's request for punitive damages suffices to permit every individual claim to remain in federal court, because the aggregate amount of punitive damages exceeds $75,000 and is imputed to each individual. Docket No. 1, at 8 (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)). But *Allen* was determined to conflict with a previous panel decision and therefore is no longer good law as to that point. "Because *Lindsey* is the earliest, and thus controlling, decision in this circuit, the punitive damages claims of the putative class cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement." *H & D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) (discussing *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978)). Other circuits have recognized that *Pitney Bowes* effectively overruled this part of *Allen*. *E.g.*, *Martin v. Franklin Capital Corp.*, 393 F.3d 1143, 1148 (10th Cir. 2004); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001).

It is not clear how much in restitution the State is seeking on behalf of individuals. Assuming without

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[14] In this discussion, "individuals" and "individual claims" includes consumers and local governments.

deciding that this case merits punitive damages under Mississippi law, the parties are bound by constitutional limits on punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); *see also Church v. Nationwide Ins. Co.*, No. 3:10-cv-636, 2011 WL 2112416, at *4 n.2 (S.D. Miss. May 26, 2011) (citing *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 721 (7th Cir.2004) (discussing constitutional limits on punitive damages imposed in cases of simple economic loss)). Again assuming that the maximum punitive damages allowed under due process would apply, an individual claim could remain in state court by seeking only an amount of restitution, plus a punitive damages multiplier in accordance with *Campbell*, that totals $75,000 or less. *See id.*; *accord Smith*, 236 F.3d at 1304 (applying similar reasoning).

Whether the case will develop in that fashion remains to be seen; the purpose of this section is to minimize the necessity for a second appeal on a jurisdictional question by resolving the parties' dispute over *Allen*. This Court recognizes uncertainty about the application of the $75,000 amount in controversy clause, *see Lowery*, 483 F.3d at 1203-07, and certifies that guidance would help this case proceed should it remain in federal court.[15]

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[15] Other courts have recognized the difficulty in construing CAFA's mass action provisions. The Eleventh Circuit found that "CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation." *Lowery*, 483 F.3d at 1198. The Ninth Circuit called the mass action language "bewildering" and once declined to rule on some of its "thorniest" provisions. *Abrego Abrego*, 443 F.3d at

There is another practical concern that could be clarified on appeal. In a later part of CAFA – in a sub-section not presented to the *Caldwell* court – the statute states that mass actions removed to federal court "shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(c)(i). "[S]ection 1407" refers to the federal statute authorizing and governing multidistrict litigation. *See id.* § 1407. CAFA thus bars a transfer to a MDL court unless a majority of plaintiffs in the mass action consent.[16]

The concern is this: in our case, who may grant or deny such consent? The State of Mississippi is the sole plaintiff. While Mississippi's consumers constitute hundreds of thousands if not millions of real

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682, 686. Commentators have agreed. Andrew D. Weinstock & Philip G. Watson, *Where Defendants Fear to Tread?*, For The Defense, Apr. 2009, at 15, 17 ("Unfortunately, the language of the [mass action] provision is dense and ambiguous. [Congress] passed a law that is puzzling, overly complex, and at times contradictory."); Spencer, 39 Loy. L.A. L. Rev. at 1073 ("CAFA's plain language by no means provides clear guidelines for attorneys or the judiciary.").

Fortunately, then, mass actions "are apparently not common. Clermont and Eisenberg's study [of federal cases decided under CAFA between February 18, 2005 and August 18, 2007] unearthed only two cases that involved a mass action and only three others that discussed a mass action." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1449 n.29 (2008) (citing Clermont & Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553, 1566 n.34 (2008) (describing federal mass actions as "rare")).

[16] In other cases, this sub-section has been moot because the action had already been transferred to a MDL court. *E.g.*, *Vioxx*, 2012 WL 10552.

parties in interest, they are not plaintiffs and there is no mechanism through which they can consent to transfer this case to a MDL court. In *Caldwell*, the real parties in interest were fewer and identifiable, and there was an opportunity for them to be found and offered a chance to participate in the case pursuant to the statute. In contrast, applying this sub-section to our real parties in interest would require a substantial number of people to be polled about their preferred forum. This is not an outcome directed by the plain language of CAFA. Nor is it one that comports with traditional standards of judicial economy and efficiency. *See State of N.J. v. State of N.Y.*, 345 U.S. 369, 372-73 (1953) (describing, in a *parens patriae* action brought pursuant to the Supreme Court's original jurisdiction, "a working rule for good judicial administration" that places a "practical limitation on the number of citizens . . . who would be entitled to be made parties" alongside the state as sovereign). If this case is returned to federal court, the parties will be asked to provide supplemental briefing on how to resolve this issue.

E. Federal Question Under the Sherman Act

As recited above, "[t]he party seeking removal bears the burden of showing that federal jurisdiction is proper," *Lone Star*, 579 F.3d at 528 (citation omitted), and "any doubt as to the propriety of removal should be resolved in favor of remand," *Hot-Hed*, 477 F.3d at 323 (citations omitted).

1. Arguments

The State contends that state antitrust remedies supplement federal remedies and are not completely preempted by them. Docket No. 20, at 11-12. It claims that the defendants' commercial activities are subject to the MAA and that any substantive defect in the

complaint is for the state courts to resolve. *Id.* at 13-15. The State argues that federal question jurisdiction here is foreclosed by existing Supreme Court caselaw. Docket Nos. 20, at 11-12; 29, at 17-19.

The defendants respond that the Sherman Act, 15 U.S.C. § 7 *et seq.*, completely preempts Mississippi's antitrust laws in this instance because the alleged violations are interstate and international in nature. Docket No. 25, at 14. "Mississippi antitrust laws apply only to intrastate activity." *Id.* (citing *Standard Oil Co. of Ky. v. State*, 65 So. 468, 470-71 (1914)). They acknowledge caselaw holding that there is no complete federal preemption in this area, but argue it is inapposite because "the Attorney General here has artfully pleaded phantom Mississippi state antitrust remedies, which do not exist for interstate conduct and transactions." *Id.* at 15.

2. Discussion

"We start with the long-established axiom that a plaintiff is master of his complaint and may generally allege only a state law cause of action even where a federal remedy is also available." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008) (citation omitted). "In determining whether a case arises under federal law, we look to whether the plaintiff's well-pleaded complaint raises issues of federal law." *Budget Prepay, Inc. v. AT & T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010) (quotation marks and citation omitted).

The defendants have invoked "the 'artful pleading' doctrine, which is an 'independent corollary' to the well-pleaded complaint rule." *Bernhard*, 523 F.3d at 551 (citation omitted). "Under this principle, even though the plaintiff has artfully avoided any suggestion of a federal issue, removal is not defeated by the

plaintiff's pleading skills in hiding the federal question." *Id.* (citation omitted). But the artful pleading doctrine "applies *only* where state law is subject to complete preemption." *Id.* (citation omitted).

"[A] state claim may be removed to federal court . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). In *Beneficial*, "the dispositive question" was whether "the National Bank Act provide[d] the exclusive cause of action for usury claims against national banks." *Id.* at 9. A review of that Act and "the special nature of federally chartered banks" supported that the answer was 'yes'; federal jurisdiction was appropriate. *Id.* at 10. This was a rare instance of complete preemption, which is an "extraordinary" finding. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *see Hoskins v. Bekins Van Lines*, 343 F.3d 769, 773 (5th Cir. 2003) (collecting the few cases finding complete preemption).

"The question in complete preemption analysis is whether Congress intended the federal cause of action to be the exclusive cause of action for the particular claims asserted under state law." *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (quotation marks and citations omitted). Courts presume that state laws are not preempted until Congress clearly states otherwise. *Id.* at 803-04. "This assumption applies with 'particular force' when Congress legislates in a field traditionally occupied by state law." *Id.* at 804 (citation omitted).

The Supreme Court has concluded that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (citations

omitted). "And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." *Id.* (citations omitted); *Moore*, 900 F. Supp. at 33.

The defendants concede the existence of *ARC America*, even as they observe that it did not address Mississippi law. Docket No. 25, at 15. They have not pointed to any statute indicating that Congress intended federal antitrust laws to completely preempt state antitrust laws and be the exclusive remedy for claimed violations of state antitrust laws. The defendants further acknowledge that "the Fifth Circuit has not decided whether a Mississippi state antitrust claim based on interstate activity is preempted by the Sherman Act," and rely instead upon two district court decisions in New York that allegedly found state antitrust laws preempted. Docket Nos. 1, at 11; 25, at 17-18.

That is not enough. The defendants have not met their burden to show that federal antitrust laws completely preempt Mississippi's antitrust laws. There is no federal question jurisdiction. *See Adams v. General Motors Acceptance Corp.*, 307 F. Supp. 2d 812, 817 (N.D. Miss. 2004) (citing *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781, 784 (5th Cir.) (holding that federal court lacked jurisdiction to consider whether state law claims were viable "considering the absence of complete preemption in the antitrust context"), *withdrawn and superseded in part*, 207 F.3d 225 (5th Cir. 2000)).

IV. Conclusion

The Attorney General of Mississippi filed this action in a Mississippi state court, to enforce Mississippi's consumer protection and antitrust laws, for the protection of the economic well-being of Missis-

sippi's consumers and governmental entities. *See McGraw*, 646 F.3d at 178. The State's motion to remand [Docket No. 19] is granted. The defendants' motion to strike [Docket No. 30] is granted. This cause will be remanded to the Chancery Court of Hinds County, Mississippi.

SO ORDERED, this the third day of May, 2012.

s/ Carlton W. Reeves

UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60704

State of MISSISSIPPI, ex rel. Jim HOOD, Attorney General,

Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba

America Electronic Components, Incorporated;
Toshiba America Information Systems, Incorporated,

Defendants - Appellants.

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

Before JOLLY, CLEMENT, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

JENNIFER WALKER ELROD, Circuit Judge, concurring in the judgment:

ISSUED AS MANDATE: Nov 21 2012

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit
By: *Sabrina B. Short*
Deputy

Nov 21 2012

New Orleans, Louisiana

APPENDIX D

U.S. COURT OF APPEALS
Received
Feb 04 2013
FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60704

State of MISSISSIPPI, ex rel. Jim HOOD,
Attorney General,

Plaintiff - Appellee,

v.

AU OPTRONICS CORPORATION; AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD;

Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated,

Defendants - Appellants.

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion ____, 5 Cir., ____, ____, F.3d ____)

Before JOLLY, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and

not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

APPENDIX E

Mississippi Antitrust Act

Sec. 75-21-1. Trust and combine; defined.

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this chapter knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of

business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this chapter.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall, for a first offense be fined in any sum not less than one hundred dollars ($100.00) nor more than five thousand dollars ($5,000.00) and for a second or subsequent offense not less than two hundred dollars ($200.00) nor more than ten thousand dollars ($10,000.00), and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

Sec. 75-21-7. Penalty for violation of anti-trust laws.

Any person, corporation, partnership, firm or association of persons and the officers and representatives of the corporation or association violating any of the provisions of this chapter shall forfeit not less than one hundred dollars ($100.00) nor more than two thousand dollars ($2,000.00) for every such violation. Each month in which such person, corporation or association shall violate this chapter shall be a separate violation, the forfeiture and penalty in such case to be recovered alone by suit in the name of the state on the relation of the attorney general and by the consent of the attorney general suits may be brought by any district attorney, such suits to be brought in any court of competent jurisdiction.

Sec. 75-21-9. Private persons and corporations may sue.

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars ($500.00), by suit in any court of competent jurisdiction. Said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. Such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit.

Sec. 75-21-37. Duties of district attorneys.

It shall be the duty of the district attorneys in their several districts, when requested by the attorney general, to enforce the civil features of the antitrust laws of this state by appropriate legal proceedings and suits at law or in equity; and their duty to enforce criminal features of said laws shall be the same as their duty to enforce other criminal statutes. All such suits shall be brought by and in the name of the State of Mississippi upon the relation of the attorney general or an authorized district attorney.

Sec. 75-21-39. Application of chapter.

No right, liability, pain, penalty, forfeiture, prosecution or suit under laws existing prior to the adoption of this chapter shall be in any wise affected thereby, but the same may be asserted, prosecuted, declared, inflicted and imposed under the laws in force prior to the adoption of this chapter. This chapter shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state.

Mississippi Consumer Protection Act

Sec. 75-24-1. Creation of office of consumer protection.

There is hereby created and established within the office of the attorney general an "Office of Consumer Protection," which shall be charged with the administration of this chapter. The attorney general is hereby authorized and empowered to employ the necessary personnel to carry out the provisions of this chapter.

Sec. 75-24-5. Prohibited acts or practices.

(1) Unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited. Action may be brought under Section 75-24-5 (1) only under the provisions of Section 75-24-9.

(2) Without limiting the scope of subsection (1) of this section, the following unfair methods of competition and unfair or deceptive trade practices or acts in the conduct of any trade or commerce are hereby prohibited:

(a) Passing off goods or services as those of another;

(b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;

(c) Misrepresentation of affiliation, connection, or association with, or certification by another;

(d) Misrepresentation of designations of geographic origin in connection with goods or services;

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses,

benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(i) Advertising goods or services with intent not to sell them as advertised;

(j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions.

Sec. 75-24-9. Injunction to restrain or prevent violation.

Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The action shall be brought in the chancery or county court of the county in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the chancery or county court of the county in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter, and such injunctions shall be issued without bond.

Sec. 75-24-11. Additional orders or judgments; appointment of receiver; revocation of license or certificate to do business.

The court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice prohibited by this chapter, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Sec. 75-24-13. Powers of receivers; right of injured party to participate; jurisdiction of court.

When a receiver is appointed by the court pursuant to this chapter, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice prohibited by this chapter, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and collect or to bring suit to collect in the name of the state for and on behalf of the owner of any chose in action, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any practices prohibited by this chapter, and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. The receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Sec. 75-24-15. Action or counterclaim by individual suffering loss; class actions prohibited.

(1) In addition to all other statutory and common law rights, remedies and defenses, any person who purchases or leases goods or services primarily for per-

sonal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use of employment by the seller, lessor, manufacturer or producer of a method, act or practice prohibited by Section 75-24-5 may bring an action at law in the court having jurisdiction in the county in which the seller, lessor, manufacturer or producer resides, or has his principal place of business or, where the act or practice prohibited by Section 75-24-5 allegedly occurred, to recover such loss of money or damages for the loss of such property, or may assert, by way of setoff or counterclaim, the fact of such loss in a proceeding against him for the recovery of the purchase price or rental, or any portion thereof, of the goods or services.

(2) In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General.

(3) In any action or counterclaim under this section of this chapter, a prevailing defendant may recover in addition to any other relief that may be provided in this section costs and a reasonable attorney's fee, if in the opinion of the court, said action or counterclaim was frivolous or filed for the purpose of harassment or delay.

(4) Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.

Sec. 75-24-19. Civil penalties; imposition and recovery.

(1) Civil remedies.

(a) Any person who violated the terms of an injunction issued under Section 75-24-9 shall forfeit and pay to the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($10,000.00) per violation which shall be payable to the General Fund of the State of Mississippi. For the purposes of this section, the chancery or county court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for recovery of civil penalties.

(b) In any action brought under Section 75-24-9, if the court finds from clear and convincing evidence, that a person knowingly and willfully used any unfair or deceptive trade practice, method or act prohibited by Section 75-24-5, the Attorney General, upon petition to the court, may recover on behalf of the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($10,000.00) per violation. One-half (1/2) of said penalty shall be payable to the Office of Consumer Protection to be deposited into the Attorney General's special fund. All monies collected under this section shall be used by the Attorney General for consumer fraud education and investigative and enforcement operations of the Office of Consumer Protection. The other one-half (1/2) shall be payable to the General Fund of the State of Mississippi. The Attorney General may also recover, in addition to any other relief that may be provided in this section, investigative costs and a reasonable attorney's fee.

(2) No penalty authorized by this section shall be deemed to limit the court's powers to insure compliance with its orders, decrees and judgments, or punish for the violations thereof.

(3) For purposes of this section, a knowing and willful violation occurs when the court finds from clear and convincing evidence that the party committing the violation knew or should have known that his conduct was a violation of Section 75-24-5.

OPPOSITION BRIEF

SUPREME COURT, U.S.
FILED
APR 24 2013
OFFICE OF THE CLERK

No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

The Fifth Circuit has now twice held that, in determining whether an action filed in state court may be removed to federal court under the Class Action Fairness Act of 2005 ("CAFA"), real parties in interest should be identified using a "claim-by-claim" approach. These two Fifth Circuit holdings bookend contrary holdings by the Fourth, Seventh, and Ninth Circuits that real parties in interest should be identified using a "whole-case" approach. Notwithstanding Congress's purpose to achieve national uniformity, these conflicting approaches have led to an intractable circuit split regarding whether actions filed by state attorneys general seeking monetary relief claims on behalf of particular citizens of the State are removable to federal court under CAFA. The circuit split has led to conflicting results even in cases arising out of the same conduct by the same defendants, namely cases alleging a global price-fixing conspiracy among manufacturers of liquid crystal display (LCD) panels. *Compare AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) (denying removal under whole-case approach), *petition for cert. held*, No. 12-911 (U.S. Mar. 22, 2013), *with Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012) (Pet. App. at 1a-22a) (granting removal under claim-by-claim approach).

The question presented here is whether an action filed by a state attorney general in state court is removable under CAFA where the State is the only named plaintiff but the action includes, among other things, monetary relief claims on behalf of particular citizens of the State.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states as follows:

Toshiba Corporation ("TSB"), Toshiba Mobile Display Co., Ltd. (f/k/a Toshiba Matsushita Display Technology Co., Ltd.) ("TMD"), Toshiba America Electronic Components, Inc. ("TAEC"), and Toshiba America Information Systems, Inc. ("TAIS") state as follows: TSB has no parent company and no publicly held corporation owns 10 percent or more of its stock. TMD is now known as Japan Display, Inc., which is 70 percent owned by Innovation Network Corporation of Japan, and TSB, Hitachi Ltd., and Sony Corporation each holds 10 percent of its outstanding shares. TAEC and TAIS are wholly owned subsidiaries of Toshiba America, Inc., which is a holding company wholly owned by TSB.

AU Optronics Corporation and AU Optronics Corporation America state as follows: AU Optronics has no parent company and no publicly held corporation owns 10 percent or more of its stock. AU Optronics America is a wholly owned but indirect subsidiary of AU Optronics Corporation, a publicly traded company.

Chi Mei Corporation and Chimei Innolux Corporation (*f/k/a* Chi Mei Optoelectronics Corporation), Chi Mei Optoelectronics USA, Inc. (*f/k/a* International Display Technology USA, Inc.), and CMO Japan Co., Ltd. (*f/k/a* International Display Technology Ltd.) state as follows: Chi Mei Corporation is a privately held corporation in Taiwan. Chi Mei Corporation has no parent company and no publicly held corporation owns 10 percent or more of its stock. Chi Mei Corporation, a privately

held corporation, owns 10 percent or more of the outstanding stock of Chimei Innolux Corporation. Chi Mei Optoelectronics USA, Inc. is a wholly owned subsidiary of CMO Japan Co., Ltd., which in turn is a wholly owned subsidiary of Chimei Innolux Corporation, a publicly traded corporation. CMO Japan Co., Ltd. is a wholly owned subsidiary of Chimei Innolux Corporation, a publicly traded corporation.

HannStar Display Corporation states as follows: HannStar Display Corporation has no parent company and no publicly held corporation holds 10 percent or more of its stock.

LG Display Co., Ltd. (*f/k/a* LG Phillips LCD Co., Ltd.) and LG Display America, Inc. (*f/k/a* LGD LCD America, Inc.) state as follows: LG Electronics owns 10 percent or more of the outstanding stock of LG Display Co., Ltd. LG Display America, Inc. is a wholly owned subsidiary of LG Display Co., Ltd.

Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc. state as follows: Samsung Electronics Co., Ltd. has no parent company and no publicly held corporation owns 10 percent or more of its stock. Samsung Semiconductor, Inc. is a wholly owned subsidiary of Samsung Electronics America, Inc. Samsung Electronics America, Inc. is a wholly owned subsidiary of Samsung Electronics Co., Ltd., a publicly held corporation.

Sharp Corporation and Sharp Electronics Corporation state as follows: Sharp Corporation has no parent company and no publicly held corporation holds 10 percent or more of its stock. Sharp

Electronics Corporation is a wholly owned subsidiary of Sharp Corporation, a publicly held corporation.

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INTRODUCTION AND STATEMENT OF THE CASE

1. Respondents agree that the petition presents an intractable conflict among the circuits on a recurring question of national importance. Respondents also agree that the circuit split has become intolerable because courts of appeals have issued conflicting decisions even in cases involving the same alleged conduct by the same defendants. *Compare Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 800 (5th Cir. 2012) (Pet. App. at 4a) ("claim-by-claim approach contrasts with other circuits that look to a state's complaint 'as a whole'"), *with AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012), *petition for cert. held*, No. 12-911 (U.S. Mar. 22, 2013) ("adopting the whole-case approach and rejecting the claim-by-claim approach"). And Respondents agree that the issue presented here has percolated through the courts sufficiently that it is ripe for this Court's review. Indeed, in the decision below, the Fifth Circuit confirmed the correctness of its analysis in the face of conflicting decisions in other circuits, and declined to reconsider that approach *en banc*. *Mississippi ex rel. Hood*, 701 F.3d at 800 (Pet. App. at 4a), *reh'g en banc denied* (Feb. 4, 2013) (Resp. App. at 68a-69a).

Respondents strongly disagree with Petitioner, however, as to Petitioner's characterization of the question presented and as to the merits of how that question should be resolved. Petitioner's question presented presumes that this case is a "*parens patriae* action" and that the State has "common-law authority to assert all claims in the complaint." Pet. at i. But the Fifth Circuit expressly held to the contrary that Petitioner "is acting, not in its *parens*

patriae capacity, but essentially as a class representative." Pet. App. at 7a. In other words, Petitioner's question presented incorrectly assumes that the key point of contention in the circuit conflict is not in dispute in this case. Petitioner's question presented ignores the particular citizens on whose behalf Petitioner seeks monetary relief claims. In fact, the circuits are split over whether "real parties in interest" should be identified "claim by claim" or based on a characterization of the "whole case" for purposes of determining federal jurisdiction under CAFA. Respondents submit that the claim-by-claim approach is the only correct standard under the plain language of CAFA and under this Court's precedents, and certiorari is necessary to set that standard as a nationwide rule. Respondents' question presented accurately frames the issue in a way that invites definitive guidance for the lower courts.

a. CAFA expands federal diversity jurisdiction for both "class actions" and "mass actions." 28 U.S.C. § 1332(d)(1)-(2), (d)(11) (2006). Class actions are defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B).

A "mass action" is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ." *Id.* § 1332(d)(11)(B). The definitions of "class actions" and "mass actions" are connected, as a mass action is "deemed to be a class action removable" to federal court "if it otherwise meets the provisions" of a "class action," including CAFA's unique minimal-

diversity and amount-in-controversy requirements. *Id.* § 1332(d)(11)(A).

Before CAFA, federal diversity jurisdiction required *complete* diversity of citizenship: every plaintiff had to be diverse from every defendant. Act of June 25, 1948, ch. 646, 62 Stat. 869, 930 (codified as amended at 28 U.S.C. § 1332(a)). Because a State is not a citizen, having a State as a party destroys complete diversity under § 1332(a). *See Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973).

CAFA, however, does not require complete diversity for removal to federal court of class actions and mass actions filed in state court. The removal standard under CAFA is *minimal* diversity, which is satisfied when "any member of a class of plaintiffs" is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2). "Class members" under CAFA means the "persons (*named or unnamed*) who fall within the definition of the proposed or certified class in a class action." *Id.* § 1332(d)(1)(D) (emphasis added). In other words, CAFA's minimal-diversity requirement is satisfied where there is diversity of citizenship between *any* defendant and *any* named or unnamed person on whose behalf the action is filed. This minimal-diversity requirement applies to mass actions because, as noted above, mass actions are deemed to be class actions for removability under CAFA to the extent they otherwise meet the requirements of § 1332(d)(2)-(10).

As also noted above, to qualify as a mass action under § 1332(d)(11)(B), and therefore be deemed a class action, a civil action must involve "monetary relief claims of 100 or more persons." Determining

whether this condition is satisfied requires consideration of whose claims are actually being asserted, as this Court has held that diversity jurisdiction must be based "upon the citizenship of real parties to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (citations omitted).

Therefore, under CAFA's minimal-diversity requirement, the inclusion of a State as a party will *not* destroy diversity if the action filed by the State seeks monetary relief claims on behalf of unnamed persons who are among the real parties in interest and any one of them is diverse from any defendant. Indeed, the Senate considered and rejected an amendment to CAFA that would have exempted state actions filed by state attorneys general from removal under CAFA. 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005).

b. The circuit conflict arises in actions that are filed by a state attorney general in state court asserting claims for monetary relief on behalf of particular citizens of the State, and are removed to federal court under CAFA. The courts of appeals are split over how to identify the real parties in interest in such actions. The claim-by-claim approach identifies the real parties in interest for each claim, including the monetary relief claims on behalf of particular citizens; if the complaint contains any "monetary relief claims of 100 or more persons," then the action qualifies as a "mass action." 28 U.S.C. § 1332(d)(11)(B). The whole-case approach identifies the real parties in interest by attempting to characterize the action as a whole based on the overall nature and effect of the action; if the action as a whole can be fairly characterized as an action on

behalf of the State, this approach disregards whether there may be other real parties in interest.

The Fifth Circuit was the first court of appeals to address this issue, and applied the claim-by-claim approach. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424-25, 429 (5th Cir. 2008). At least one district court outside the Fifth Circuit has followed the claim-by-claim approach. *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010). The Fourth, Ninth, and Seventh Circuits have applied the conflicting whole-case approach. *AU Optronics Corp.*, 699 F.3d at 394 (4th Cir. 2012); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 773-74 (7th Cir. 2011).

In this case, the Fifth Circuit acknowledged the contrary whole-case approach but reaffirmed the claim-by-claim approach first set forth in *Caldwell*, thereby confirming and entrenching the circuit split. Pet. App. at 1a-11a.

c. As discussed in more detail below in Section II.A., the claim-by-claim approach is mandated by the plain language of CAFA, which defines a mass action as a civil action "*in which* monetary relief *claims* of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B) (emphasis added). The only proper way for courts to determine whether a case is a civil action "in which" there are 100 or more persons with monetary relief "claims" is to evaluate each claim in the complaint one by one.

Other provisions of CAFA confirm the claim-by-claim approach. For example, the general-public provision under § 1332(d)(11)(B)(ii)(III) illustrates

that actions are not mass actions where "*all* of the claims . . . are asserted on behalf of the general public . . . pursuant to a state statute specifically authorizing such action." In order to evaluate whether this provision applies, courts must review the claims one by one to determine whether they are "all" asserted on behalf of the general public and whether all of the claims are pursuant to a "state statute."

Moreover, unlike complete diversity, minimal diversity cannot be destroyed merely because the State is a plaintiff. Evaluating the "whole case" to determine whether a State is a party is dispositive for the complete diversity test, but not for minimal diversity. If other real parties in interest exist (named or unnamed), their citizenship must be taken into account for minimal diversity. Thus, courts must identify all real parties in interest claim by claim to determine whether the minimal-diversity requirement is satisfied. The whole-case approach effectively avoids the inquiry necessitated by the statute.

d. Extending federal jurisdiction to actions like this one serves the principal objective of CAFA. Congress enacted CAFA in 2005 with the express purpose of expanding the district courts' diversity jurisdiction to reach class action cases of national importance. Class Action Fairness Act of 2005, § 2(b)(2), Pub. L. No. 109-2, 119 Stat. 4, 5. Congress explicitly found that "[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." *Id.* § 2(a)(4). Thus, CAFA's

express remedial purpose was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2). This Court recently confirmed that "CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting CAFA). That general guidance will not, however, alleviate the entrenched circuit conflict because *Standard Fire* addressed only the amount-in-controversy provisions of CAFA.

The lawsuit brought here by the Mississippi Attorney General against twenty-two corporate entities from nine multinational corporate families is exactly the type of interstate case — indeed it is an *international* case — contemplated by CAFA. None of the Respondents is a Mississippi resident, and all of them are part of corporate families headquartered in Asia. Resp. App. ¶¶ 3-31. The Mississippi Attorney General alleges that Respondents engaged in an international conspiracy to fix prices for liquid crystal display ("LCD") panels. *Id.* ¶ 41. All of Respondents' alleged conspiratorial activities are alleged to have occurred outside of Mississippi, mostly in Asia. *Id.* ¶¶ 79, 81-82. Respondents sold billions of dollars' worth of LCD panels in the international market from 1996 through 2006, which is the relevant period in the complaint. *Id.* ¶¶ 40-41. Certain of those panels were incorporated into common consumer electronic products such as LCD televisions, notebook computers and cell phones, and placed into international and interstate commerce

before being purchased nationwide, including by Mississippi consumers. *Id.* ¶¶ 50, 52, 77.

This action is one of dozens of similar actions that have been filed across the country in both state and federal courts asserting similar claims based on the same alleged conspiracy. A consolidated multidistrict proceeding is pending in the Northern District of California ("MDL Court"), *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL Docket No. 1827, which includes various private class actions (including a class action brought on behalf of Mississippi consumers who purchased LCD products), direct actions by "opt-out" plaintiffs, and actions brought by the attorneys general of several States.

Indeed, much of the Petitioner's complaint is a *carbon copy* of complaints filed in the MDL Court, including the complaint filed by the class of Mississippi purchasers. *Compare* Resp. App. ¶¶ 52, 56, 77, *with* Indirect-Purchaser Pls.' Second Consolidated Am. Compl. ¶¶ 101, 105, 128, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827, MDL Docket No. 1827 (N.D. Cal. Dec. 5, 2008), ECF No. 746.

These LCD cases are follow-on litigation to a federal-government antitrust investigation; Petitioner's complaint admits this "action arises from criminal charges and indictments by the U.S. Department of Justice related to price fixing by LCD manufacturers." Resp. App. at 2a. This case concerns not only Mississippi, but rather is interconnected with the other class actions litigated in the MDL Court and other proceedings across the

country and in foreign jurisdictions, all of which will have implications for both interstate and international commerce and raise sensitive issues of comity with foreign jurisdictions. Therefore, the LCD antitrust actions filed against Respondents in federal and state courts asserting claims based on alleged overcharges — all of which are based on the same alleged international conspiracy — are exactly the type of "interstate cases of national importance" that Congress intended to be litigated in federal court under CAFA.

2. Petitioner, the Mississippi Attorney General, originally filed a complaint in Mississippi state court. The complaint asserts two claims: one for alleged violations of the Mississippi Consumer Protection Act ("MCPA"), Miss. Code Ann. § 75-24-1 et seq., and the other for alleged violations of Mississippi's Antitrust Act ("MAA"), Miss. Code Ann. § 75-21-1 et seq. Resp. App. ¶¶ 192-206. The complaint expressly alleges that this "action is brought pursuant to the Attorney General's authority" under the MCPA and MAA. Resp. App. at 2a.

Based on statutory authority under the MCPA and MAA, Petitioner is "bringing this action on behalf of the State of Mississippi in its proprietary capacity on its own behalf, *and on behalf of Mississippi residents*, including local governmental entities." Resp. App. at 65a ¶ 3 (emphasis added). The complaint asserts that, while certain Respondents have paid criminal fines to the United States government with regard to the alleged price fixing conspiracy, those fines left "[u]naddressed . . . any form of restitution for consumers or governmental entities which purchased products at

an artificially inflated price." Resp. App. at 2a. In its prayer for relief, the complaint requests restitution for the State's purchases of LCD products and "*for the purchases of its citizens.*" Resp. App. at 65a ¶ 2 (emphasis added).

The complaint thus confirms that Petitioner is seeking to represent Mississippi consumers who purchased LCD products, and is seeking restitution on their behalf (*i.e.*, "monetary relief claims of 100 or more persons"). Resp. App. at 2a ("Attorney General Jim Hood brings this action *on behalf of . . . natural persons* residing in the State"); *id.* ("The attorney general brings this suit in the State's proprietary capacity on its own behalf, including *on behalf of Mississippi citizens*"); *id.* at 65a ¶ 3 ("bringing this action *on behalf of . . . Mississippi residents*") (emphasis added).

Petitioner is not simply seeking restitution on behalf of the State for the State's proprietary purchases. Petitioner admits in the petition to seeking restitution "on behalf of [Mississippi's] citizens . . . *who suffered losses by purchasing LCD panel products* during the relevant period." Pet. at 7 (emphasis added). Petitioner is seeking to represent a class of Mississippi citizens who purchased LCD panel products during the period in question. Indeed, that is what the Fifth Circuit expressly held: "At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative." Pet. App. at 10a.

Respondents removed the action to federal court under CAFA as a "mass action" under 28 U.S.C. § 1332(d)(11), and as a "class action" under 28 U.S.C.

§ 1332(d)(2). Resp. App. at 73a. Following removal to federal court, Petitioner filed a motion to remand to state court, and the district court granted the motion. Pet. App. at 23a-60a. The district court held that the suit is a mass action because Mississippi consumers are the real parties in interest as to Petitioner's claims for restitution, but held that federal jurisdiction does not extend to this case because the general-public provision of 28 U.S.C. § 1332(d)(11)(B)(ii)(III) applies. Pet. App. at 44a-52a. The district court also rejected Respondents' argument that this case is a "class action" under 28 U.S.C. § 1332(d)(1)(B). Pet. App. at 40a-44a. The Fifth Circuit reversed, upholding the removal under CAFA. Pet. App. at 1a-12a.

The Fifth Circuit held that the "real parties in interest in Mississippi's suit are those more than 100 persons who, by substantive law, possess the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Pet. App. at 5a (citation omitted). Applying a claim-by-claim analysis, the court held that both "the State (as a purchaser of LCD products) *and* individual citizens who purchased the products within Mississippi possess 'rights to be enforced,'" and thus "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 5a-6a (emphasis in original). The Fifth Circuit expressly acknowledged that its claim-by-claim approach "contrasts with other circuits that look to a state's complaint 'as a whole' and then subjectively determine if the state alone is the real party in interest." Pet. App. at 4a. The Fifth Circuit also expressly relied on this Court's precedent for its

identification of the real parties in interest. *Id.* at 8a (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982)).

Although the Fifth Circuit agreed with the district court that this case is a mass action and that it is not a class action under § 1332(d)(1)(B), it reversed the district court's ruling regarding CAFA's general-public provision and held that the provision does not apply because the "requirement that 'all of the claims' be asserted on behalf of the public is not met here." *Id.* at 9a. Thus, granting the petition using Respondents' question presented will allow this Court to address the question of whether class actions should be evaluated for minimal-diversity purposes under the claim-by-claim or whole-case approach.

REASONS FOR GRANTING THE WRIT

This is a compelling case for the Court's review, which is needed to resolve an intractable circuit conflict on a recurring question of national importance. It is intolerable for the circuits to apply divergent removal standards causing opposite outcomes for indistinguishable claims arising out of the same alleged conduct against the same defendants under almost identical state statutes. This issue has made its way through the courts and four circuits have now embraced one of two approaches: the claim-by-claim approach or the whole-case approach. These are the only two approaches taken by the courts and no others have been suggested by any court. In this case, the Fifth Circuit confirmed that it will apply the claim-by-claim approach despite the conflicting standard

applied by other circuits. The Fourth Circuit, in a case involving many of the same defendants, applied the conflicting whole-case approach leading to the opposite outcome. *See* Pet. for Writ of Certiorari at 13, *AU Optronics Corp. v. South Carolina*, No. 12-911 (U.S. Jan. 23, 2013). The circuit split is entrenched and only this Court can resolve it.

In actions across the country filed by state attorneys general asserting monetary relief claims on behalf of particular citizens, courts are applying the "whole-case" approach and ignoring unnamed real parties in interest, contrary to the text and purpose of CAFA. *See* Pet. at 30 (collecting numerous cases). This is a recurring problem. Indeed, four actions by state attorneys general arising out of the same alleged global LCD conspiracy have been remanded to state court under that approach. *Madigan*, 665 F.3d at 773-74 (Illinois); *AU Optronics Corp.*, 699 F.3d at 394 (South Carolina); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 849 (9th Cir. 2011) (Washington and California attorney general cases consolidated for appeal). These LCD cases involve billions of dollars in international commerce and mostly foreign defendants located in Asia. Resp. App. at ¶¶ 3-31, 41. Congress intended for all of these class action cases of national importance to be litigated in federal court, but the whole-case approach has prevented their removal.

For the reasons set forth below, the Court should grant the petition to set a nationwide standard for assessing federal jurisdiction under CAFA over state attorney general actions that include monetary relief claims on behalf of particular citizens of a state.

I. THERE IS AN ACKNOWLEDGED AND INTRACTABLE CIRCUIT CONFLICT ON THE REMOVABILITY STANDARD UNDER CAFA.

Courts have expressly acknowledged the circuit split. The Ninth Circuit observed that it "adopted the approach of looking at the case as a whole to determine the real party in interest, rather than the claim-by-claim approach adopted in *Caldwell*." *Nevada*, 672 F.3d at 670. The Seventh Circuit "rejected the claim-by-claim analysis" and held that whether "a state is the real party in interest in a suit is a question to be determined from the 'essential nature and effect of the proceeding.'" *Madigan*, 665 F.3d at 773 (citations omitted) (internal quotation marks omitted). All of the parties in this case acknowledge the split. Pet. at 13-18.

The claims in *AU Optronics Corp. v. South Carolina* and this case both arise out of the same alleged global LCD price fixing conspiracy, and both cases involve many of the same defendants. Pet. for Writ of Certiorari at ii, 7, 8, *AU Optronics Corp.*, No. 12-911 (U.S. Jan. 23, 2013); Resp. App. ¶¶ 3-5, 17-19, 40, 41. The respective state attorney general in each case seeks restitution on behalf of individuals who purchased LCD products. The Fourth Circuit applied the whole-case approach and remanded the case to state court. The Fifth Circuit, however, applied the claim-by-claim approach and held that federal jurisdiction under CAFA extends to this case. Thus, because of the circuit conflict, cases involving nearly identical claims have experienced opposite outcomes depending on the circuit.

The circuit split has spread across four of the most populous circuits in the country in terms of

population, encompassing nineteen States and approximately 150 million people.

The conflict cannot be resolved without guidance from this Court on how to identify the real parties in interest under CAFA. Identifying the real parties in interest is necessary for several reasons. CAFA defines mass actions as actions "in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly"; identifying the real parties in interest enables courts to determine whether the 100-person threshold has been met. 28 U.S.C. § 1332(d)(11)(B) (emphasis added). Furthermore, identification of the real parties in interest is necessary to determine whether CAFA's minimal-diversity requirement — which requires that both named and unnamed plaintiffs must be considered — has been met. 28 U.S.C. § 1332(d)(1)-(2). Finally, ascertaining whether particular citizens are real parties in interest is necessary to determine whether "all" claims satisfy the general-public provision.

Petitioner's question presented does not squarely address the circuit conflict. By ignoring the particular citizens on whose behalf Petitioner asserts monetary relief claims, Petitioner's question presented leapfrogs over the issue of identifying the "real" parties in interest. Respondents' question presented more accurately frames the issues presented by the petition, and the circuit split. This case is unquestionably an action brought by the state attorney general naming only the State as a plaintiff in the complaint, but seeking monetary relief on behalf of particular citizens of the State. The issue is whether jurisdiction under CAFA extends to such actions, and whether the real parties in interest for

the monetary relief claims should be taken into consideration (*i.e.*, whether the real parties in interest should be identified claim-by-claim).

II. CIRCUITS APPLYING THE WHOLE-CASE APPROACH ARE REMANDING CASES OF NATIONAL IMPORTANCE, CONTRARY TO CAFA'S TEXT AND PURPOSE.

A. The Text of CAFA Mandates a Claim-by-Claim Approach to Identifying the Real Parties in Interest.

The text of CAFA mandates the claim-by-claim approach. CAFA defines "mass action" with reference to whether it is a "civil action" with "claims of 100 or more persons" proposed to be tried together. 28 U.S.C. § 1332(d)(11)(B)(i). Thus, CAFA expressly recognizes that separate "claims" may be part of a larger "civil action." *Id.* CAFA effectively instructs courts to determine whether any "claims" in a civil action are asserted on behalf of or made by "100 or more persons." To do so, courts must evaluate each "claim," not the civil action "as a whole," and determine who the real parties in interest are for each claim. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). Moreover, the principle that diversity jurisdiction must be based on the citizenship of the real parties in interest, rather than that of the named parties, is established by settled precedent of this Court. *See Navarro*, 446 U.S. at 461 ("A federal court must . . . rest jurisdiction only upon the citizenship of real parties

to the controversy."); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901).

Further, the definition of mass action does not exclude actions where a State is "a" real party in interest. During Congress's formulation of CAFA, forty-six state attorneys general wrote a letter to the Senate majority and minority leaders supporting an amendment that would have precluded CAFA's application to actions filed by state attorneys general. 151 CONG. REC. S1157, 1158-59 (daily ed. Feb. 9, 2005). The Senate considered and rejected such an amendment. 151 CONG. REC. S1157, S1165 (daily ed. Feb. 9, 2005).

The proposed amendment would have "create[d] a loophole that . . . plaintiffs' lawyers will surely manipulate . . . to persuade a State attorney general to . . . lend the name of his or her office to a private class action." 151 CONG. REC. S1157, 1163-64 (daily ed. Feb. 9, 2005). Indeed, in this case, Petitioner is represented by an out-of-state private law firm that specializes in representing class action plaintiffs. Likewise, counsel for the South Carolina Attorney General in *AU Optronics Corp. v. South Carolina* also represented a plaintiff in one of the class actions in the MDL Court in one of the related LCD cases.

The very fact that CAFA refers to "monetary relief claims" indicates that a court must examine each of the "claims" to determine which ones seek monetary relief and which seek only declaratory or injunctive relief or civil or administrative penalties. Furthermore, CAFA's definition of a mass action does not look to the civil action "as a whole," but to actions "*in which* monetary relief claims of 100 more persons

are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B) (emphasis added). Whether the civil action includes claims other than monetary relief claims has no bearing under the statutory language. The whole removability scheme under CAFA is claim-based.

The claim-by-claim approach, and CAFA's terminology, comport with modern, claims-based pleading practice. For example, Rule 2 of the Federal Rules of Civil Procedure provides that there "is one form of action — the civil action"; Rule 3 provides that a "civil action is commenced by filing a complaint"; Rule 8(a) provides that a complaint shall state a "claim"; and Rule 18 provides for liberal joinder of "claims." In this context, CAFA's definition of a "mass action" plainly includes an action with a complaint containing the qualifying monetary relief claims of 100 or more persons.

Furthermore, the general-public provision of the mass action definition confirms that CAFA mandates a claim-by-claim approach. That provision illustrates that CAFA's mass action definition does not apply to those actions in which "*all* of the claims in the action are asserted on behalf of the general public (and not on behalf of *individual claimants* or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (emphasis added). Courts can determine whether "all" claims are asserted on behalf of the general public only by analyzing each claim one by one because if any single claim is asserted on behalf of an individual, the provision does not apply. If Congress intended to exempt actions simply because the State is bringing *some* claims — or even

most claims — on behalf of the general public, as the whole-case approach seems to require, it would have used the word "any" instead of "all" in the general-public provision. Furthermore, courts can only determine if all of the claims are pursuant to a "state statute" (as opposed to some of them being pursuant to common law) by examining each individual claim.

Petitioner is mistaken in arguing that the Fifth Circuit's claim-by-claim approach improperly renders superfluous CAFA's general-public provision. Pet. at 27 (discussing § 1332(d)(11)(B)(ii)(III)). Section 1332(d)(11)(B)(ii), the CAFA subsection containing the general-public provision, confirms and illustrates the definition of "mass action." For example, while the definition of "mass action" in § 1332(d)(11)(B)(i) expressly refers to a civil action in which monetary relief claims of 100 or more persons are "to be tried jointly," § 1332(d)(11)(B)(ii)(IV) provides that "mass action" shall not include actions in which "claims have been consolidated or coordinated solely for pretrial proceedings." The latter provision is plainly underscoring or illustrating the definition in the former provision, which after all has already defined "mass action" with reference to claims to be "tried jointly." Likewise, the general-public provision — in stating that "mass action" does not include actions in which "all" claims are on behalf of the general public — underscores or illustrates that "mass action" includes any action that includes any claim for monetary relief on behalf of 100 or more persons. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (recognizing that Congress uses the word "mean" to "cabin a definition to a specific list of enumerated items," as distinguished from the

word "include," which "makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive"); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:7 (7th ed. 2012) (highlighting that the word "include" usually indicates enlargement or illustrations, while the word "mean" "excludes any meaning that is not stated").

The plain language of CAFA thus calls for the claim-by-claim approach correctly adopted by the Fifth Circuit.

B. The Whole-Case Approach Is Unworkably Subjective.

As the Fifth Circuit observed, the whole-case approach suffers from being subjective. Pet. App. at 4a (observing that "other circuits . . . look to a state's complaint 'as a whole' and then subjectively determine if the state alone is the real party in interest"). That approach requires courts to engage in an artificial balancing test to determine which claims the district court views as most important — something that may not be clear from the face of the complaint. Moreover, the whole-case approach forces courts to ignore that a case may have multiple real parties in interest. *AU Optronics Corp.*, 699 F.3d at 394 (finding by Fourth Circuit that "the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings"). The claim-by-claim approach, on the other hand, allows courts to assess the realities of the case that

may include multiple claims and multiple real parties in interest.

The application of the whole-case approach by the Fourth and Ninth Circuits highlights a glaring problem with that approach. Both of those courts concluded that the monetary claims on behalf of particular citizens were merely "tacked on" to the other claims in the complaint, including those seeking injunctive relief and civil penalties. *AU Optronics Corp.*, 699 F.3d at 393 (Fourth Circuit) (finding that the "nature and effect of these actions demonstrate that South Carolina is the real party in interest, a fact that is unencumbered by the restitution claims . . . when tacked onto other claims being properly pursued by the State"); *Nevada*, 672 F.3d at 671 (Ninth Circuit) ("Nevada's sovereign interest in protecting its citizens and economy from deceptive mortgage practices is not diminished merely because it has tacked on a claim for restitution"). In fact, the potential liability posed by restitution claims can dwarf the civil penalties and injunctive relief sought in cases of this type. Dismissively characterizing the restitution claims as being "tacked on" ignores the realities of these cases. And there is no principled basis on which courts can determine which claims are "important" and which are simply "tacked on."

In this case, Petitioner's restitution claims are based on the alleged overcharges from every single purchase of an LCD product by a Mississippi consumer for a ten-year period. Resp. App. ¶ 40. Petitioner is likely to seek hundreds of millions of dollars in restitution. The injunctive relief, on the other hand, is based on alleged conduct that, even on

the face of the complaint, ended in 2006. *Id.* (defining the relevant period as January 1, 1996 to December 11, 2006). As it is pleaded, the reality of this case is that it is mostly about the restitution claims asserted on behalf of the individual Mississippi purchasers. *See* 151 CONG. REC. 1157 at 1161-62 (noting the proposed amendment excluding state attorneys general actions from CAFA "would create a potential loophole big enough to drive a truck through" and recounting experiences in Texas where the state attorney general was used as a conduit by private plaintiffs' attorneys). Yet, as the decisions by the Fourth and Ninth Circuits illustrate, courts applying the whole-case approach could conclude that the injunctive relief claims are the "essential nature" of the complaint while the restitution claims are merely "tacked on."

C. The Claim-by-Claim Approach Comports with this Court's Precedent and the Minimal-Diversity Test in CAFA.

Petitioner argues that the claim-by-claim approach is inconsistent with this Court's prior precedent regarding the "real party in interest test." Pet. at 20-24. In fact, the Court has never addressed federal "mass action" jurisdiction under CAFA. Congress enacted CAFA in 2005, and since then the Court has decided only one case interpreting the scope of CAFA jurisdiction; the Court found in favor of federal jurisdiction in that case. *Standard Fire Ins. Co.*, 133 S. Ct. at 1350.

The claim-by-claim approach is consistent with the history of the Court's real-party-in-interest analysis. That analysis has been developed mostly in

cases filed in or removed to federal court under either the complete diversity requirement of § 1332(a) or the Court's original jurisdiction over disputes between States under 28 U.S.C. § 1251(a). In those cases, jurisdiction often hinged on whether the State was "a" real party in interest (if so, jurisdiction was precluded in complete diversity cases but present in disputes between States), and the Court could ignore whether other real parties in interest were present in a subset of the claims in the complaint.

Under CAFA, however, only minimal diversity is required. 28 U.S.C. § 1332(d)(2). Thus, even if the State is a real party in interest, the minimal-diversity requirement can be met by the existence of other real parties in interest (named or unnamed). By refusing to recognize the particular individuals — on whose behalf the States are seeking monetary relief claims — as real parties in interest, the whole-case approach relies entirely on case law developed under the pre-CAFA "all or nothing" approach to complete diversity cases and disputes between States, where jurisdiction hinges on the diametrically opposed consideration of whether the State is "a" real party in interest.

This Court has held that, outside the complete-diversity context, "most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed *claim by claim*." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552-54 (2005) (emphasis added). Under CAFA, where complete diversity is not required, the rationale of the claim-by-claim approach advocated in other jurisdictional contexts must apply. The cases

cited by Petitioner do not say otherwise. Pet. at 20-24 (citing cases evaluating the "essential nature and effect of the proceeding" where minimal diversity was not at issue).

Here, the Fifth Circuit held that Petitioner's restitution claims belong to Mississippi citizens, and they are the real parties in interest for those claims, not the State. Pet. App. at 8a-9a (holding that "the real parties in interest in this suit include both the State and individual consumers of LCD products"). That opinion is fully consistent with this Court's "real party in interest" jurisprudence. *See Snapp*, 458 U.S. at 602 ("[P]rivate parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party."); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911) (holding that State is a nominal party for purposes of federal jurisdiction where it did not seek to protect its own property or any other interest, but sought "only to vindicate the wrongs of some of its people").

III. THIS CASE, THROUGH RESPONDENTS' QUESTION PRESENTED, IS A COMPELLING VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.

This case comes to the Court on a clean record with the issue crisply presented in a way that will enable the Court to resolve the circuit conflict and provide authoritative guidance to the lower courts. The lower courts in this case addressed both the "real party in interest test" and the general-public provision, two issues over which the courts are split.

Compare Pet. App. at 9a-10a (Fifth Circuit finding the general-public provision does not apply in this case), *with Madigan*, 665 F.3d at 772 (Seventh Circuit finding the general-public provision applies in a nearly identical case to this one).

Moreover, if the Court grants the petition on Respondents' question presented, it may address the related issue of whether "class action" cases under 28 U.S.C. § 1332(d)(1)(B) should be evaluated for purposes of minimal diversity under the claim-by-claim or whole-case approaches. That issue was fully briefed and considered by both lower courts. Pet. App. at 2a-3a & Pet. App. at 40a-44a. Although those courts rejected Respondents' class action argument, it provides an alternative ground for affirming the Fifth Circuit's judgment.

"Class actions" and "mass actions" are interrelated, and many of the same issues arising out of the circuit split apply to "class action" cases because "mass actions" are deemed "class actions" for purposes of CAFA. 28 U.S.C. § 1332(d)(11)(A). Thus, the minimal-diversity requirement applies to both "mass actions" and "class actions."

Moreover, unlike other removal statutes, Congress intended CAFA to be interpreted liberally to allow removal of mass actions and class actions, and thus the burden of defeating removal is on Petitioner. Therefore, in cases where a state is essentially acting as a class representative — as the Fifth Circuit held here — for monetary relief claims on behalf of particular citizens of a state, the provisions of CAFA should be broadly construed to allow removal. *See, e.g., Acosta v. Master Maint. &*

Constr. Inc., 452 F.3d 373, 376-77 (5th Cir. 2006) (finding "general rule of construing removal statutes strictly" to be improper where Congress's purpose and intent is "to provide federal courts with broad jurisdiction"); *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994) (giving the removal statute under the Foreign Sovereign Immunities Act an "expansive interpretation" given "Congress's unusually strong preference for adjudication of claims against foreign states in the federal court system").

CONCLUSION

The petition for a writ of certiorari should be granted on the question presented in this response.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

[Filed March 25, 2011]

Civil Action No. G2011-516 T/1

THE STATE OF MISSISSIPPI, ex rel.
JIM HOOD, ATTORNEY GENERAL,

Plaintiff,

v.

AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA INC.; CHI MEI CORPORATION; CHI ME OPTOELECTRONICS CORPORATION; CHI MEI OPTOELECTRONICS USA, INC., F/K/A INTERNATIONAL DISPLAY TECHNOLOGY USA, INC.; CMO JAPAN CO., LTD., F/K/A INTERNATIONAL DISPLAY TECHNOLOGY LTD.; CHUNGHWA PICTURE TUBES LTD.; HANNSTAR DISPLAY CORPORATION; HITACHI, LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; LG DISPLAY CO., F/K/A LG PHILLIPS LCD CO., LTD.; LG DISPLAY AMERICA, INC., F/K/A LGD LCD AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA MOBILE DISPLAY CO., LTD. F/K/A TOSHIBA MATSUSHITA DISPLAY TECHNOLOGY CO., LTD.; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; AND TOSHIBA AMERICA INFORMATION SYSTEMS, INC.,

Defendants.

PRELIMINARY STATEMENT

This action arises from criminal charges and indictments by the U.S. Department of Justice related to price fixing by LCD manufacturers, subsequent guilty pleas by various co-conspirators, and criminal fines, exceeding $890 million paid to the U.S. government. Unaddressed is any form of restitution for consumers or governmental entities which purchased products at an artificially inflated price. Also unaddressed are the civil penalties due to States whose laws were violated by the wrongful conduct. Attorney General Jim Hood brings this action on behalf of the State of Mississippi, including natural persons residing in the State, the State of Mississippi in its proprietary capacity and local governmental entities in the State of Mississippi. This action is brought pursuant to the Attorney General's authority under Mississippi Code § 75-24-1, et seq., and under § 75-21-1, et seq. The illegal scheme conducted by the defendants in this action artificially inflated the prices of Liquid Crystal Display ("LCD") panels and products—sold throughout the State as components of computers, televisions, and electronic devices. Defendants' wrongdoing has affected each sale of LCD panels and products sold in the State of Mississippi. Accordingly, this action seeks injunctive relief, restitution, damages, and civil penalties for each violation, pursuant to Mississippi Code §§ 75-24-1 et seq. and 75-21-1, et seq.

THE PARTIES

1. The State of Mississippi is the Plaintiff in this case, brought in its name on relation of the attorney general. The attorney general brings this suit in the State's proprietary capacity on its own behalf, including on behalf of Mississippi citizens, and on behalf of

local governmental entities; the State of Mississippi has a quasi-sovereign interest in the direct and indirect effect of defendants' illegal conspiracy on the state's economy and the citizens' economic condition.

2. LCD panels are employed in a wide range of products affecting the education, business, home life, and commerce of Mississippi, including laptop computers, personal computer monitors, mobile phones, digital cameras, video cameras, LCD TVs and car navigation systems.[1] The segment of citizens adversely impacted by defendants' conduct is a sufficiently substantial segment of the State's population to establish Mississippi's quasi-sovereign interests, as relief is sought on behalf of all local governmental entities and consumers (not limited groups of private parties) who bought a wide range of price-fixed products. Additionally, the fact that the State of Mississippi has already addressed illegal anti-trust conduct like defendants', through its Mississippi Antitrust Act and the Mississippi Consumer Protection Act is evidence that the State of Mississippi has a quasi-sovereign interest.

3. AU Optronics Corporation, one of the largest manufacturers of LCD panels, with its corporate headquarters at No. 1, Li-Hsin Rd. 2, Hsinchu Science Park, Hsinchu 30078, Taiwan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

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[1] In 2005, 71% of U.S. households had cell phones, according to data released by the U.S. Census Bureau. http://www.census.gov/newsroom/releases/archives/income_wealth/cb09-174.html. In 2000, 61.8% of U.S. households had computers. http://www.census.gov/population/www/pop-profile/files/dynamic/Computers.pdf.

4. AU Optronics Corporation America, Inc., a wholly owned and controlled subsidiary of defendant AU Optronics Corporation, with its corporate headquarters at 9720 Cypresswood Drive, Suite 241, Houston, Texas and facilities located in San Diego and Cupertino, California, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

5. Defendants AU Optronics Corporation and AU Optronics Corporation America, Inc. are referred to collectively herein as "AU Optronics."

6. Chi Mei Corporation, another of the largest manufacturers of LCD panels, with its corporate headquarters at No. 11-2, Jen Te 4th St., Jen Te Village, Jen Te, Tainan 717, Taiwan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

7. Chi Mei Optoelectronics Corporation, another of the largest manufacturers of LCD panels and a wholly-owned subsidiary of Chi Mei Corporation, with its global headquarters at No. 3, Sec. 1, Huanshi Rd., Southern Taiwan Science Park, Sinshih Township, Tainan County, 74147 Taiwan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

8. Chi Mei Optoelectronics USA, Inc., f/k/a International Display Technology USA, Inc., a wholly owned and controlled subsidiary of Chi Mei Cor-

poration, with its corporate headquarters at 101 Metro Drive Suite 510, San Jose, California, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

9. CMO Japan Co., Ltd., f/k/a International Display Technology, Ltd., a subsidiary of Chi Mei Corporation, with its principal place of business located at Nansei Yaesu Bldg. 3F, 2-2-10 Yaesu, Chuo-Ku, Tokyo 104-0028, Japan, is hereby named as a defendant. During the relevant timeframe this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

10. Defendants Chi Mei Corporation, Chi Mei Optoelectronics Corporation, ChiMei Optoelectronics USA, Inc., and CMO Japan Co., Ltd., are referred to collectively herein as "Chi Mei."

11. Chunghwa Picture Tubes Ltd. ("Chunghwa"), a leading manufacturer of LCD products, with its global headquarters at 1127 Hopin Rd., Padeh City, Taoyuan, Taiwan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

12. HannStar Display Corporation ("HannStar"), with its headquarters at No. 480, Rueiguang Road, 12th Floor, Neihu Chiu, Taipei 114, Taiwan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

13. Hitachi, Ltd., with its headquarters at 6-6 marunouchi 1-chome, Chiyoda-ku, Tokyo, 100-8280, Japan, is hereby named as a defendant. During the relevant timeframe this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

14. Hitachi Displays, Ltd., with its principal place of business located at AKS Bldg. 5F, 6-2 Kanda Neribei-cho 3, Chiyoda-ku, Tokyo, 101-0022, Japan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

15. Hitachi Electronic Devices (USA), Inc., a wholly owned and controlled subsidiary of defendant Hitachi Ltd., with its principal place of business located at 575 Mauldin Road, Greenville, South Carolina 29607, is hereby named as a defendant. During the relevant timeframe this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

16. Defendants Hitachi Displays Ltd., Hitachi America Ltd. and Hitachi Electronic Devices (USA), Inc. are referred to collectively herein as "Hitachi."

17. LG Display Co., Ltd., f/k/a LG Phillips LCD Co., Ltd., a leading manufacturer of LCD panels and a joint venture created in 1999 by Philips Electronics NV and LG LCD, which maintains offices in San Jose, California, and which has its principal place of business located at 20 Yoido-dong, Youngdungpo-gu, Seoul, 150-721, Republic of Korea, is hereby named as a defendant. During the relevant time frame this

defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

18. LG Display America, Inc. f/k/a LGD LCD America, Inc., with its principal place of business located at 150 East Brokaw Rd., San Jose, CA 95112, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

19. Defendants LG Display Co., Ltd. and LG Display America, Inc. are referred to collectively herein as "LGD."

20. Samsung Electronics Co., Ltd., with its principal place of business at Samsung Main Building, 250-2 ga, Taepyung-ro Chung-gu, Seoul, Republic of Korea, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

21. Samsung Semiconductor, Inc., a wholly-owned and controlled subsidiary of Samsung Electronics Co., Ltd., with its principal place of business at 3655 North First Street, San Jose, California 95134, is hereby named as a defendant. During the relevant timeframe this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

22. Samsung Electronics America, Inc., ("Samsung America"), a wholly-owned and controlled subsidiary of defendant Samsung Electronics Company, Ltd., with its principal place of business at 105 Challenger Road, Ridgefield Park, New Jersey 07660, is hereby

named as a defendant. During the relevant time frame Samsung America sold and distributed LCD Products manufactured by Samsung Electronics Company, Ltd. to consumers throughout the United States, including Mississippi.

23. Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Semiconductor, Inc. are referred to collectively herein as "Samsung."

24. Sharp Corporation, with its principal place of business at 22-22 Nagaike-cho, Abeno-ku, Osaka 545-8522, Japan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

25. Sharp Electronics Corporation, a wholly owned and controlled subsidiary of Sharp Corporation with its principal place of business at Sharp Plaza, Mahwah, New Jersey, 07430, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

26. Defendants Sharp Corporation and Sharp Electronics Corporation are referred to collectively herein as "Sharp."

27. Toshiba Corporation, with its principal place of business at 1-1, Shibaura 1-chome, Minato-ku, Tokyo, 105-8001, Japan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

28. Toshiba Matsushita Display Technology Co., Ltd., with its principal place of business located at Rivage Shinagawa, 1-8, Konan 4-chome, Minato-ku, Tokyo, 108-0075, Japan, is hereby named as a defendant. During the relevant time frame this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

29. Toshiba America Electronics Components, Inc., a wholly owned and controlled subsidiary of defendant Toshiba Corporation with its corporate headquarters at 19900 MacArthur Blvd., Ste, 400, Irvine, CA 92612, is hereby named as a defendant. During the relevant timeframe this defendant manufactured, marketed, sold and/or distributed LCD panels to customers throughout the United States, including Mississippi.

30. Defendant Toshiba America Information Systems, Inc. is a California corporation with its principal place of business at 9470 Irvine Boulevard, Irvine, California. Toshiba America Information Systems, Inc. is a wholly-owned and controlled subsidiary of Toshiba America, Inc. During the relevant time frame Toshiba America Information Systems, Inc. sold and distributed TFTLCD Products manufactured by Toshiba Corporation to customers throughout the United States, including Mississippi.

31. Defendants Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd., and Toshiba America Electronic Components, Inc. are referred to collectively herein as "Toshiba."

32. Wherever in this complaint a family of defendant-corporate entities is referred to by a common name, it shall be understood that Plaintiff is

alleging that one or more officers or employees of one or more of the named related defendant companies participated in the illegal acts alleged herein on behalf of all of the related corporate family entities.

33. Various persons and entities whose identities are unknown to Plaintiff at this time, participated as co-conspirators in the violations alleged herein and performed acts and made statements in furtherance thereof. Once the identities of these presently-unknown co-conspirators are ascertained, Plaintiff will seek leave of court to add them as named defendants herein.

34. Other co-conspirators whose identities are known to Plaintiff include the following companies: Epson Imaging Devices Corporation, ("Epson"); LG Electronics, Inc. and LG Electronics USA, Inc. ("LG Electronics"); Royal Philips Electronics N.V. and Philips Electronics North America Corp. ("Philips Electronics"). Other co-conspirators whose identities are known to plaintiffs include the following: Hydis Technologies Co., Ltd., f/k/a BOE Hydis Technology Co., Ltd. ("Hydis").

35. Should the facts warrant, Plaintiff may at a later date move to add as defendants herein all of these named co-conspirators.

36. The acts charged in this Complaint have been done by defendants and their co-conspirators, or were authorized, ordered, or done by their respective officers, agents, employees, or representatives while actively engaged in the management of each defendant's business or affairs.

37. Each of the defendants named herein acted as the agent or joint venturer of or for the other defendants with respect to the acts, violations and

common course of conduct alleged herein. Each defendant that is a wholly-owned subsidiary of a foreign parent is the United States agent for its parent company.

JURISDICTION AND VENUE

38. Although the conspiratorial and other acts complained of herein may have occurred outside the state of Mississippi, the conspiratorial agreements, sale ofthe LCD products at monopoly prices and the other overt and/or unlawful acts complained of herein were intended to and, in fact, have caused substantial harmful effects within the state of Mississippi. Therefore, this court under Miss. Code §75-24-9 has subject matter jurisdiction over this action. It likewise has in personam jurisdiction over defendants under the substantial effects doctrine.[2]

39. Pursuant to Miss. Code §75-24-9, this Court is likewise a proper venue for this action.

FACTUAL ALLEGATIONS

40. This case arises out of a long-running conspiracy extending from at least January 1, 1996 through at least December 11, 2006, at a minimum, among defendants and their co-conspirators, the purpose and effect of which was to fix, raise, stabilize, and maintain prices for LCD panels sold to the public including the consuming public of the State of Mississippi.

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[2] *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Court found Sherman Act jurisdiction over foreign conduct which "was meant to produce and did in fact produce some substantial effect in the United States.")

41. Defendants and their co-conspirators illegally formed an international cartel to restrict competition in the LCD panel market, affecting billions of dollars of commerce, throughout the United States, including Mississippi, where thousands of LCD transactions took place. The conspiracy included communications and meetings in which defendants agreed to eliminate competition and fix the prices for LCD panels. As a result of defendants' price fixing conspiracy, the defendants have violated the consumer protection laws and antitrust laws of the State of Mississippi.

42. The conspiracy described herein affected adversely every LCD transaction in the State of Mississippi, and, more particularly, Mississippi State Agencies and other consumers who indirectly purchased defendants' LCD panels. Specifically, Defendants' conspiracy has resulted in an adverse monetary effect on indirect-purchasers throughout Mississippi.

43. Prices of LCD panels in Mississippi were raised to supra-competitive levels by the defendants and their co-conspirators. Defendants knew that commerce in LCD panels and LCD-containing products in Mississippi would be adversely affected by implementing their conspiracy. By their conspiracy they:

a. Raised the cost of LCD-containing products for State Agencies and also to the residents of the state of Mississippi;

b. Raised the cost of LCD-containing products in the state of Mississippi by acts or omissions committed outside Mississippi and by regularly doing or soliciting business in Mississippi;

c. Engaged in persistent courses of conduct within Mississippi and/or derived substantial

revenue from the marketing of LCD panels or the products in which they are used in Mississippi (and services relating to such marketing); and

d. Committed acts or omissions that they knew or should have known would Raised the cost of LCD-containing products (and did, in fact, cause such damage) in Mississippi.

A. Definitions

44. As used herein, the phrase "LCD" means the LCD display technology that involves sandwiching a liquid crystal compound between two glass plates called "substrates." The resulting screen contains hundreds or thousands of electrically charged dots, called pixels, that form an image. This panel is then combined with a back light unit, a driver, and other equipment to create a "module" allowing the panel to operate and be integrated into a television, computer monitor or other product.

45. As used herein, the phrase "LCD panel" refers to the particular kinds of LCD panels that are used in LCD products.

46. As used herein, the phrase "LCD products" includes but is not limited to the following products of which LCD panels are a component: televisions, computer monitors, laptop computers, phones, etc.

47. As used herein, the term "OEM" means any original equipment manufacturer of LCD products.

48. As used herein, the term "ODM" means any original design manufacturer of LCD products.

49. As used herein, the term "relevant time frame" refers to the time period January 1, 1996 through December 11, 2006.

B. LCD Technology

50. During the relevant time frame, the State of Mississippi and its citizens indirectly purchased LCD panels contained in LCD products from one or more of the defendants named herein for end use and not for resale.

51. As a result of defendants' illegal price-fixing agreement, Plaintiff and other consumers in Mississippi paid more for LCD products than they would have absent such illegal conduct.

52. LCD is a type of display technology utilized in products including TVs, computer monitors, laptops, mobile phones, digital cameras, and numerous other electronic products. LCD panels are the dominant form of display screen in the TV, computer monitor, and laptop industries. Computer monitors now comprise approximately 50% of revenues for the large LCD products market, with TVs and laptop computers accounting for approximately 27% and 21% of revenues, respectively. All other LCD products combined accounted for between 2-5% of LCD panel revenues during the relevant time frame.

53. LCD technology offers benefits over both traditional cathode-ray tube (CRT) technology and the other flat screen technology, commonly called "plasma." LCD is thin and light and uses low power. Thus, unlike CRTs, which are heavy and bulky, LCD panels can fit into a laptop and permit mobility. Because a CRT is so bulky, CRTs have never been used in laptop computers. For TVs and monitors, LCD panels use less space than traditional CRT technology, can be mounted on a wall because of their light weight, and offer superior viewing angles.

54. The other flat panel technology, plasma, is not practical for use in laptops. Because plasma has a high power requirement, it "runs hot" and cannot be operated by battery power. In addition, because of problems called "burn-in" and the fragility of the plasma panel itself, plasma has not been used in the laptop market. Thus, normally only LCD panels are used to make laptops.

55. LCD technology dominates the flat panel market. It has virtually 100% market share for laptops and flat panel computer monitors, and at least 80% market share for flat panel TVs.

C. Manufacturing An LCD Panel

56. The technology behind LCDs is not new. In the 1950s and 1960s, RCA Corp. researched whether liquid crystals could be the basis for lightweight, low-power display technology. In the 1970s, after RCA Corp. discontinued its efforts, Japanese companies took the lead in commercializing liquid crystal technology. These efforts resulted in monochrome calculators and watches. By the early 1990s, liquid crystal technology was introduced in notebook computers and small, low-resolution televisions. In the mid-1990s, the technology advanced further with the development of LCDs.

57. LCD uses liquid crystal to control the passage of light. More specifically, an LCD panel is made of two glass sheets sandwiching a layer of liquid crystal. The front glass sheet is fitted with a color filter, while the back glass substrate has transistors fabricated on it. When voltage is applied to a transistor, the liquid crystal is bent, allowing light to pass through to form a pixel. The front glass sheet contains a color filter, which gives each pixel its own color. The combination

of these pixels in different colors forms the image on the panel.

58. There are significant manufacturing and technological barriers to entry in the LCD products market. A state-of-the-art fabrication plant (called "fabs" in the industry) can cost upwards of $2 billion, and changing technology requires constant investments in research and development. The most expensive material used to make an LCD panel is the glass. In industry language, glass sizes advance in what are called "generations." These generation sizes have developed at a rapid pace, continuing to expand in size.

59. Since 2000, glass substrate size for LCD panels has approximately doubled every eighteen months. Large-generation glass offers great economies of scale: larger sheets allow display manufacturers to produce more, and larger, panels from a single substrate more efficiently.

60. Today's eighth generation glass substrates have about four times the surface area of fourth generation substrates, which means they yield more (and larger) LCD panels. For instance, one eighth generation substrate can produce the panels needed for fifteen 32" LCD televisions. Larger sheets of glass reduce manufacturing costs. For example, panel costs were approximately $20/inch for fourth generation fabs, falling to $10/inch for fifth generation fabs, and then falling another 80% to the eighth generation.

61. There have been at least eight generations of LCD fabs, each requiring significant new investment. Because building a new fabrication line or retrofitting the old line, is very expensive, and because the glass is nearly all sourced from the same supplier, Corning

Incorporated, LCD panel manufacturers use standard sizes for their products. Thus, for the major input cost, each has the same supplier. A fab line that works with one size glass cannot switch over to another size without substantial retrofitting.

62. Additionally, because the fabrication plants are most efficient when they cut standard sizes for panels, different manufacturers with different generation fabs seek to make only the most efficient size panels for that fab. For example, a fab that makes 730 mm x 920mm glass sheets can cut that sheet to make exactly six 17" LCD panels. A fab that uses 680mm x 880mm glass can cut exactly six 15" panels from that glass. But different generation fabs inefficiently yield non-standard LCD panel sizes, with the rest of the glass as waste. Thus, when defendants need other panel sizes not efficiently made by their fabs, they cross-purchase from each other. For example, LGD supplies certain size panels to other s, and, in turn, buys other size panels from Chunghwa, Chi Mei, and AU Optronics. HannStar and Chunghwa have an agreement whereby Chunghwa supplies 17" panels to HannStar and HannStar supplies 19" panels to Chunghwa. Samsung has a joint venture with Sony to supply each other with LCD panels, but Samsung also purchases panels from AU Optronics and HannStar. HannStar makes panels for Hitachi. Chunghwa makes panels for AU Optronics, and Chi Mei makes panels for Sharp and Toshiba, as well as Sanyo.

63. These cross-licensing and cross-purchasing agreements provide opportunities for collusion and coordination among members, as well as a means of checking, agreeing on, and controlling prices and output, not only a priori, but a posteriori in order to

detect cheating on agreements to limit output and fix prices. Antitrust risk is also particularly acute when there are cooperative efforts to develop, design, implement, and license certain technologies, as exist in the LCD products market.

64. There is a great deal of cross-licensing and there are many cooperative arrangements in the LCD products market, all of which create additional opportunities for collusive activity. The various joint ventures, cross licenses, and other cooperative arrangements among the s have provided a means of implementing and policing the agreements to fix prices and limit output for LCD panels that defendants have entered into at numerous meetings described hereafter. For example, defendants Samsung, and LGD recently agreed to an unprecedented level of cooperation in conducting their flat-panel display businesses. In addition, with respect to LCD products:

a. Defendant Chi Mei has licensing arrangements with defendants Sharp, AU Optronics, Chunghwa, HannStar, and Hitachi.

b. Defendant AU Optronics has licensing agreements with defendants Sharp and Samsung.

c. Defendant Hitachi has a joint venture with, inter alia., Toshiba called IPS

d. Alpha.

e. Defendant Sharp makes LCD panels for defendant Toshiba.

f. Defendants Samsung and Sharp have cross licenses for the sharing of LCD panel technology and intellectual property.

65. These combinations are between significantly large rivals and not trivial. The effects of these combinations substantially lessen competition and/or tend to create a monopoly, and were used as part and parcel of the conspiracy alleged herein and in furtherance of it.

D. The Size and Structure of the Markets for LCD Panels and LCD Products

66. The market for LCD panels is huge. Manufacturers produced approximately 48.4 million LCDs for televisions in 2006, and flat-panel sales—most of those using LCD technology—reached approximately $US 88 billion in 2006 and $US 100 billion in 2007.

67. The market for the manufacture and sale of LCD panels is conducive to the type of collusive activity alleged herein. Since January 1996 at the latest to the present (the "conspiratorial period"), defendants collectively controlled a significant share of the market for LCD panels, both globally and in the United States. Specifically, the top six companies (Samsung, LGD, Chi Mei, AU Optronics, Sharp and Chunghwa) currently control in excess of 80% of the LCD panels market. As such, the defendants' conspiracy to fix the price of LCD panels substantially affected interstate trade and commerce in the LCD products market.

68. The LCD panels industry has experienced significant consolidation during the conspiratorial period, as reflected by AU Optronics' acquisition of Quanta Display, the creation in 2001 of AU Optronics itself through the merger of Acer Display and Unipac Electronics, Fujitsu Limited's transfer of its LCD business to Sharp in 2005, the merger of the LCD operations of Toshiba and Matsushita into one entity,

defendant Toshiba Matsushita Display Co., Ltd., in 2002, and the joint venture for the production of LCD panels for televisions by Hitachi, Toshiba, and Matsushita in 2004.

69. A number of the defendants and/or their corporate parents or subsidiaries, including Samsung, Hitachi, Epson, Sharp, and Toshiba, have either pled guilty to, or are currently being investigated by the U.S. Department of Justice for entering into one or more price-fixing agreements in other closely-related industries similar to that alleged herein. Such industries include dynamic random access memory ("DRAM") computer chips, static random access memory ("SRAM") computer chips, and NAND chips or flash memory ("Flash"). The DRAM, SRAM, and Flash industries are oligopoly industries dominated by many of the same defendants as in the LCD panel industry, which has a similar oligopoly structure. The defendants' entry into express price-fixing agreements in other computer electronics markets demonstrates that the oligopoly structure of those industries has not in itself been sufficient to achieve price uniformity and output controls, but that agreement among the market participants has been required to achieve price uniformity and output controls. Such evidence tends to exclude the possibility that price uniformity in the LCD panel industry, which is similar to the DRAM, SRAM, and Flash industries and includes some of the same defendants is merely a result of normal market forces, rather than express agreement.

70. Notably, LCD panels are the largest product by revenue for many of these defendants. For example, in 2005, the LCD panel industry was nearly double the size of the DRAM market.

71. Products using medium-size and large LCD panels, such as televisions, desktop monitors, and computers, in 2004, made up 90% of the revenues for LCD panel makers. Direct purchasers buy LCD panels in order to include them as components in TVs, computer monitors, laptops, and other electronic products. The largest direct purchasers of LCD panels are computer OEMs such as Dell, HP, Apple, and Gateway, Significantly, a number of the defendants are also computer and/or television OEMs, such as Toshiba and Samsung (computers) and Samsung, Hitachi, and Toshiba (televisions).

72. LCD panels have no independent utility, and have value only as components of other products, such as TVs, computer monitors, and laptops. The demand for LCD panels thus directly derives from the demand for such products.

73. The market for LCD panels and the market for the products into which they are placed are inextricably linked and intertwined because the LCD panel market exists to serve the LCD products markets. The market for LCD panels and the markets for the products in which LCD panels are placed are, for all intents and purposes, inseparable in that one would not exist without the other.

74. Plaintiff and other indirect purchasers within the State of Mississippi have participated in the market for LCD panels through their purchases of products containing such panels. The defendants' unlawful conspiracy has inflated the prices at which Plaintiff and other indirect purchasers have bought products made with LCD panels, and Plaintiff and other indirect-purchasers in Mississippi have paid supra-competitive prices for LCD panels contained in such products.

75. Plaintiff and other Mississippi indirect purchasers participate in the market for products containing LCD panels. To the extent Plaintiff and other indirect purchasers bought LCD panels as part of an LCD product, defendants' unlawful conspiracy inflated the prices at which OEMs resold LCD panels in these products.

76. Each transaction in the state of Mississippi constituted a violation of Mississippi statute, due to supra-competitive prices for products containing LCD panels.

E. Anti-Competitive Violations Alleged

77. Beginning at a date as yet unknown to the Plaintiff, but at least as early as January 1, 1996, and continuing thereafter up to and including December 11, 2006, at a minimum, defendants and their co-conspirators agreed, combined, and conspired to raise, maintain, and stabilize at artificial levels the prices at which LCD panels have been sold directly and indirectly in the United States, in Mississippi.

78. Defendants, through their officers, directors, and employees, effectuated a contract, combination, trust, or conspiracy between themselves and their coconspirators by, among other things:

a. Participating in meetings and conversations to discuss the prices and supply of LCD panels in the United States;

b. Agreeing to fix the prices and limit the supply of LCD panels sold in the United States in a manner that deprived direct and indirect purchasers of free and open competition;

c. Issuing price announcements and quotations in accordance with the agreements reached;

d. Selling LCD panels to various customers in the United States at fixed, noncompetitive prices; and,

e. Invoicing customers in the United States at the agreed-upon fixed prices for LCD panels and transmitting such invoices via U.S. mail and other interstate means of delivery.

F. Defendants' Agreements to Set Prices and Limit Production

79. The LCD panel conspiracy alleged herein was effectuated through a combination of group and bilateral discussions that took place in Japan, Korea, Taiwan, and the United States. In the early years, beginning in at least 1996, representatives of the Japanese defendants Hitachi, Sharp and Toshiba met and agreed to fix prices for LCD panels generally, as well as to specific OEMs; they also agreed to limit the amount of LCD panels each would produce.

80. In the early years, when the conspiracy was principally limited to the Japanese defendants, bilateral discussions were the preferred method of communication. As more manufacturers entered the conspiracy, however, group meetings became more prevalent.

81. As LCD production in Korea began to increase and become more sophisticated, the Japanese defendants expanded their meetings to include their Korean competitors, including defendants LGD and Samsung, both of which also agreed to fix prices and control supply. At or about this same time, the Japanese defendants began to partner with those defendants located in Taiwan to trade technology and collaborate on supply. Japanese engineers were lent to Taiwanese firms, and Taiwanese output was

shipped to Japan. In 2001, the Korean defendants convinced Taiwanese LCD panel manufacturers, including defendants AU Optronics, Chi Mei, Chunghwa, and HannStar, to join the conspiracy to fix prices and control supply. Defendants' conspiracy included agreements on the prices at which certain defendants would sell LCD panels and products to their own corporate subsidiaries and affiliates that manufactured LCD-panel containing products, thereby ensuring that LCD panel prices remained the same as between defendants and their OEM customers, preventing any price competition on LCD products to consumers.

G. Crystal Meetings

82. In early 2001, high-level employees of at least two large manufacturers of LCD panels met in person and agreed to engage in periodic meetings to exchange sensitive competitive information and to fix the price of LCD panels and limit their production. From early 2001 through at least 2006, officials from defendants Samsung, AU Optronics, Chunghwa, Chi Mei, HannStar, LGD, and Sharp, met periodically in Taiwan to discuss and reach agreements on LCD panel prices, price increases, production, and production capacity, and did in fact reach agreements increasing, maintaining, and/or fixing LCD panel prices and limiting their production. The group meetings these defendants participated in were called "Crystal Meetings." Each defendant attended multiple meetings with one or more of the other defendants during this period. The Crystal price-fixing and output-limitation meetings occurred in Taiwan; other similar meetings took place in South Korea, Japan, and the United States on a regular basis throughout this period.

83. The Crystal Meetings were highly organized and followed a set protocol. Meetings among defendants' high-level executives were called "CEO" or "Top" meetings; and, those among defendants' vice presidents and senior sales executives were called "Commercial" or "Operational" meetings.

84. "CEO" meetings occurred quarterly from approximately 2001 to 2006. The purpose and effect of these meetings was to stabilize or raise prices. Each meeting followed the same general pattern, with a rotating designated "chairman" who would use a projector or whiteboard to put up figures relating to the supply, demand, production, and prices of LCD panels for the group to review. Those attending the meetings would take turns sharing information concerning prices, monthly and quarterly LCD fab output, production, and supply, until a consensus was reached concerning the participants' prices and production levels of LCD panels in the coming months or quarter.

85. The structure of "Commercial" meetings was largely the same as "CEO" meetings. These meetings took place more frequently than "CEO" meetings and occurred approximately monthly.

86. During all of these meeting, defendants exchanged information about current and anticipated prices for their LCD panels, and thereafter, reached agreement concerning the specific prices to be charged in the coming weeks and months for LCD panels. Defendants set these prices in various ways, including, but not limited to, setting "target" prices, "floor" prices, and the price range or differential between different sizes and types of LCD panels.

87. During these CEO/Commercial meetings, defendants also exchanged information about supply, demand, and their production of LCD panels, and, thereafter, often reached agreement concerning the amounts each would produce. Defendants limited the production of LCD panels in various ways, including, but not limited to, line slowdowns, delaying capacity expansion, shifting their production to different-sized panels, and setting target production levels.

88. During these CEO/Commercial meetings, defendants also agreed to conceal the fact and substance of the meetings, and, in fact, took various steps to do so. Top executives and other officials attending these meetings were instructed on more than one occasion to refrain from disclosing the fact of these meetings to outsiders, or even to other employees of the defendants not involved in LCD panel pricing or production. On at least one occasion top executives at a CEO meeting staggered their arrivals and departures at the meeting site so that they would not be seen in the company of each other coming or going to the meeting.

89. The structure ofthe so-called "working level" meetings was less formal than the CEO or Commercial meetings, and often occurred at restaurants over a meal. The purpose of the "working level" meetings was to exchange information on price, supply and demand, and production information which then would be transmitted up the corporate reporting chain to those individuals with pricing authority which facilitated implantation of the conspiracy and effectuated the agreements made at the CEO and at the Commercial meetings.

90. In approximately the summer of 2006, when they began to have concerns about antitrust issues,

defendants discontinued the working-level meetings in favor of one-on-one meetings to exchange pricing and supply information. These meetings were coordinated so that on the same date, each competitor met one-on-one with the other in a "round robin" set of meetings until all competitors had met with each other. These "round robin" meetings took place until at least November or December of 2006. The information obtained at these meetings was transmitted up the corporate reporting chain to permit the defendants to maintain their price-fixing and production-limitation agreement.

H. Bilateral Discussions

91. During the Crystal Meetings, defendants also agreed to engage in bilateral discussions with those defendants not attending these meetings. Certain defendants were "assigned" other defendants not in attendance and agreed to and did in fact communicate with non-attending defendants to synchronize the price and production limitations agreed to at the Crystal Meetings. For example, HannStar contacted Hitachi, to relay the agreed-upon prices and production limitations. Subsequently, the Japanese defendants implemented the agreed-upon pricing and production limitations that had been conveyed to Hitachi by Hannstar. This is one of the ways in which the Japanese defendants participated in the conspiracy to fix the prices and limit the production of LCD panels.

92. Crystal Meetings were also supplemented by additional bilateral discussions between various defendants in which they exchanged information about pricing, shipments, and production. As is more fully alleged below, defendants had bilateral discussions with one another during price negotiations with

customers in order to avoid cutting prices and to implement the fixed prices set by defendants during the Crystal Meetings. These discussions usually took place between sales and marketing employees in the form of telephone calls, e-mails, and instant messages. The information gained in these contacts was then shared with supervisors and taken into account in determining the price to be offered the defendants' OEM customers.

I. Defendants' Participation in Group and Bilateral Discussions

93. Defendants AU Optronics, Chi Mei, Chunghwa, HannStar, LGD, and Samsung attended multiple CEO, Commercial, and working-level meetings, as well as bilateral discussions during the conspiratorial period. Additionally, Quanta Display and Unipac, which merged with AU Optronics, participated in working-level meetings. At the CEO and Commercial meetings, these defendants agreed on prices, price increases, and production limits and quotas for LCD panels.

94. Defendant Sharp participated in multiple working-level meetings, as well as bilateral discussions with other defendants, during the conspiratorial period. Through these discussions, Sharp agreed with the other defendants and co-conspirators named in this complaint on prices, price increases, and production limits and quotas for LCD panels.

95. Defendant Hitachi participated in multiple bilateral discussions with defendants, including HannStar, during the conspiratorial period. Through these discussions, Hitachi agreed on prices, price increases, and production limits and quotas for LCD panels.

96. Defendant Toshiba participated in multiple bilateral discussions with other defendants, including Sharp, during the conspiratorial period. Through these discussions, Toshiba agreed on prices, price increases, and production limits and quotas for LCD panels. As pleaded below, defendant Sharp admitted to participating in bilateral meetings, conversations, and communications in Japan and the United States with unnamed co-conspirators during which they fixed the prices of LCD panels sold to Dell for use in computers; panels sold to Apple for use in iPods; and panels sold to Motorola for use in Razr phones during the conspiratorial period. During this time, Toshiba was one of Sharp's principal competitors in the sale of LCD panels to Dell for use in computers, as well as for panels sold to Apple for use in the iPod. In fact, in the small-to-medium size LCD display market, Toshiba Matsushita was ranked second (behind Sharp) in worldwide market share in the first half of 2005, with a 14.5 percent market share during the first quarter and a 14.1 percent market share during the second quarter. Sharp could not have successfully fixed the prices of LCD panels sold to Dell or Apple unless Toshiba agreed to fix prices of similar LCD panels at supra-competitive levels to those two OEMs.

97. Toshiba also participated in the conspiracy by entering into joint ventures and other arrangements to manufacture or source flat panels with one or more of the defendants that attended the Crystal Meetings. The purpose and effect of these joint ventures by Toshiba and others was to limit the supply of LCD panels and fix prices of such panels at unreasonably high levels and to aid, abet, notify and facilitate the effectuation of the price-fixing and production-limitation agreements reached at the meetings. Dur-

ing the relevant time frame, Toshiba sought and formed strategic partnerships with other LCD manufacturers which allowed it to easily communicate and coordinate prices and production levels with other manufacturers as part of the overall conspiracy alleged herein. For instance, Toshiba formed HannStar in January 1998 as a manufacturing joint venture. In 2001, Toshiba, Sharp, Matsushita, and Hitachi formed a joint venture to share basic LCD research costs. In 2001, Toshiba and Matsushita formed a joint venture, Advanced Flat Panel Displays, which merged their LCD operations. In April of 2002, Toshiba and Matsushita formed a joint venture, Toshiba Matsushita Display Technology Co., Ltd., which combined the two companies' LCD development, manufacturing, and sales operations. In 2004, Toshiba, Matsushita, and Hitachi formed a joint venture, IPS Alpha Technology, Ltd., which manufactures and sells LCD panels for televisions. In 2006, Toshiba purchased a 20% stake in LGD' LCD panel manufacturing facility in Poland. And in 2007, Toshiba and Sharp formed a joint venture in which Toshiba agreed to provide 50% of Sharp's chip needs and Sharp agreed to provide 40% of Toshiba's panel needs. The operation and management of these many different joint ventures enabled Toshiba and the other defendant-joint venture partners regular opportunities to communicate with each other to agree on prices, price increases and production limits and quotas for LCD panels that each defendant manufactured and sold.

98. Plaintiff is informed and believes, and alleges, that the three predecessor companies, AU Optronics, Unipac, QDI, and ACER participated as co-conspirators in the conspiracy. AU Optronics, by assuming all rights and obligations of these co-conspirators, is

jointly liable for their anticompetitive conduct. For example, before its merger with ACER to form AU Optronics, Unipac attended several working level meetings with Chunghwa, Chi Mei, Samsung, Sharp, and Mitsubishi, and exchanged market, shipment, and pricing information with these competitors. In addition, before it was merged into AU Optronics, QDI had anti-competitive contacts with AU Optronics, Chunghwa, Chi Mei, HannStar, Samsung, Sharp, LG, Toshiba, and Hitachi dating at least as far back as 2001.

99. Plaintiff is informed and believes, and thereon alleges, that conspirator Hydis participated in multiple working level meetings with AU Optronics, Chunghwa, Chi Mei, HannStar, and Samsung, and at least one bilateral meeting between at least 2002 and 2005. Through these discussions, Hydis agreed on prices, price increases, and production limits and quotas for LCD panels.

100. Plaintiff is informed and believes, and thereon alleges, that Mitsubishi participated in working level meetings in 2001 with a number of defendants. For example, an April 28, 2001, internal e-mail of AUO reflects that a "consensus" amount LG, Samsung, Chunghwa, Mitsubishi, and HannStar had been reached regarding pricing for 15" panels.

J. Market Conditions Demonstrating the Conspiracy

101. Since at least 1996, the LCD panel market has not behaved as would be expected of a competitive market free of collusion. Rather, the behavior in this market strongly evidences that the defendants engaged in a significant price-fixing conspiracy which

had the purpose and effect of stabilizing and raising prices for LCD panels at supra-competitive levels.

102. After initially being introduced into a market, consumer electronics products and their component parts typically are characterized by steady downward pricing trends. However, since at least 1996, the LCD panel market has been characterized by unnatural price stability and certain periods of substantial upward pricing trends.

103. Moreover, since at least 1996, the LCD panel market has not followed the basic laws of supply and demand in a competitive market. In a competitive market, price increases normally occur during periods of shortage. Since at least 1996, however, there have been significant price increases in the LCD panel market during periods of both oversupply and shortage.

104. It is generally acknowledged that demand for consumer electronic products and their component parts increases steadily over time. As would be expected, demand for LCD panels and products made with them were steadily and substantially increasing throughout the relevant time frame. For instance, a June 2006 forecast indicated that 2006 shipments of LCD panels used in televisions would reach 46.7 million units, a 74% increase from 2005. By 2009, sales of LCD televisions are expected to surpass sales of CRT televisions for the first time; and by 2010, LCD televisions will account for a majority of all televisions sold worldwide.

105. Rather than competing for this increased demand, however, since at least 1996, defendants worked together to stabilize prices by agreeing to fix prices at artificially high levels and to restrict the

supply of LCD panels through, among other things, decreasing their capacity utilization and refraining from expanding existing capacity. Those defendants which were not already manufacturing LCD panels in 1996 joined this conspiracy when they began manufacturing LCD panels.

106. In 1996, the LCD panel market was experiencing excess supply and drastic price cuts. Prices had already fallen 40 to 50 percent in 1995, and were projected to continue dropping due to lower manufacturing costs. However, LCD panel prices began rising in 1996, allegedly due to insufficient production capacity. In fact, defendants were fixing the prices.

107. The reverse in the downward spiral of LCD panel prices began in early 1996. Defendants blamed the sudden increase in prices on an alleged inability to supply enough LCD panels to meet demand. By May of 1996, an industry magazine was reporting that, "[f]lat-panel-display purchasers are riding a roller coaster of pricing in the display market, with no clear predictability anytime soon .... Perplexed purchasers trying to keep up with the gyrating market can take solace that even vendors are constantly being surprised by the sudden twists and turns."

108. Soon thereafter, industry analysts began commenting on the unusual rise in TFT LCD panel prices, noting that this rise in prices was "quite rare in the electronics industry."

109. The year 1996 also brought the advent of third generation fabrication plants. Since 1996, as defendants entered the LCD panel market, they have updated their production facilities for LCD panels in

order to keep pace with developing technology, which has resulted ultimately in at least eight generations of LCD panels. LG Electronics was scheduled to have its third generation fab online by 1997, and Hyundai was scheduled to do so by early 1998. Each new LCD panel generation was produced from ever larger pieces of glass, so as to reduce the cost of the screens used in televisions, computer monitors, and laptops. Ever-increasing production capacity threatened to outstrip demand for LCD panels, with the result that prices of LCD panels should have decreased rapidly. Instead, defendants falsely claimed to be operating at full capacity and unable to meet demand, despite the millions of units of over-capacity that had supposedly existed months earlier, and prices surged upwards. These price increases were also inconsistent with the fact that production had become more efficient and cost effective.

110. The artificially high costs of LCD panels during the relevant time frame are demonstrated by, inter alia, the fact that costs were decreasing. One of the most significant costs in producing an LCD panel is the cost of its component parts. Some of the major component parts for an LCD panel include the back light, color filter, PCB polarizer, and glass. Indeed, for large area LCD panels, the costs of these components comprise over two-thirds of the total cost of production. During the relevant time frame, the costs of these components collectively and individually have been generally declining, and in some periods at a substantial rate. Thus, the gap between LCD panel manufacturers' prices and their costs was unusually high during the relevant time frame.

111. During the end of 2001 and 2002, LCD panel prices increased substantially while the costs to

produce these panels remained flat or decreased. Similarly, during the end of 2003 to 2004, LCD panel prices again increased by a substantial amount, while costs remained flat or decreased. This economic aberration is the intended and necessary result of defendants' conspiracy to raise, fix, maintain, or stabilize the prices of LCD panels. LCD panel prices increased by more than 5% for the first time in 2001 in October of that year. These price increases continued until June of 2002, resulting in an approximately 35% increase in the average selling price of 15-inch LCD panels. Defendants were essentially able to raise the prices of LCD panels by at least $60 USD from October of 2001 through May 2002.

112. At the time, defendants blamed these cost increases on supply shortages. In fact, these price increases were a direct result of defendants' agreement to fix, maintain, and/or stabilize the prices of LCD panels and defendants' false statements about supply shortages were designed to conceal their price-fixing agreement. When asked why prices had increased, defendants repeatedly explained that the increases in LCD prices were due to increased demand and a "supply shortage."

113. These price increases occurred as production costs declined due to lower prices for parts and components as well as improvements in manufacturing efficiency. While the price of 15-inch LCD panels, for instance, shot up from US$190-200 in the third quarter of 2001 to US$250 in the first quarter of this year, current production costs remained at approximately US$200. These decreasing costs should have led to lower prices and competition among defendants. Instead, because defendants had entered into

an agreement to fix, raise, and maintain LCD panels at artificially high levels, it resulted in extremely high profits.

114. For example, defendants AU Optronics Inc., Chi Mei Optoelectronics Corp., Chunghwa Picture Tubes Ltd., and HannStar Display Inc. posted higher pretax profits than expected in the first quarter of 2002.

115. This increase in prices and revenue was unprecedented. During the first six months of 2002, revenue for Taiwan's five major LCD panel manufacturers (defendants AU Optronics, Chi Mei, Chunghwa Picture Tubes Ltd., HannStar Display Inc., and Quanta Display Inc. (later purchased by AU Optronics) rose 184% from the same period in 2001.

K. Public Statements Reflecting the Conspiracy

116. Additionally, defendants made repeated public statements admitting to or referencing their agreement to fix LCD panel prices through supply manipulation.

117. On or about January 20, 2003, Hsu Wen-lung, defendant Chi Mei's Chairman, stated that "both Taiwanese and South Korean TFT-LCD panel makers should avoid the fierce price competition and build a money-making environment. To this end, both sides are recommended to exchange market information periodically."

118. Again, on January 29, 2003, KY. Lee, the Chairman of defendants AU Optronics publicly stated that "the local TFT-LCD industry should move to set up a reasonable and healthy pricing strategy thus avoiding the price fluctuations."

119. Soon after these public statements were made, LCD panel prices increased for five consecutive quarters in 2003 and 2004, the direct result of the CEO, Commercial and working-group meetings identified above and which took place on a regular basis over this period of time. LCD panels used in laptops and computer monitors increased by as much as 28% during this time period as reported by defendant AU Optronics. Similarly, defendant LGD reported similar price increases over the same period.

120. This price-fixing scheme resulted in substantial increases in the profits reaped by the defendant LCD panel manufacturers. For example, the eight largest LCD panel manufacturers reported a collective profit increase of 740% between the second quarter of 2003 and the second quarter of 2004. These record profits resulted from defendants' agreement to fix, raise, maintain or stabilize the price of LCD panels.

121. Although the price increases were the direct result of defendants' agreement to fix, raise, and maintain the price of LCD panels, they repeatedly made public statements blaming these price increases on other factors. For example, at an August 2003 flat panel industry conference sponsored by DisplaySearch, Dr. Hui Hsiung, executive vice president of defendant AU Optronics, explained the recent increases in the price of LCD panels was due to increased demand and supply shortage. In March of 2004, Liu Chih-chun, Chunghwa's vice president blamed the high prices on an inadequate supply of key parts from upstream suppliers.

122. In fact, while LCD panel prices were increasing in late 2003 and the first half of 2004, defendants AU Optronics, Chi Mei, and HannStar

were decreasing capacity utilization. AU Optronics delayed construction of a new generation plant to help prices increase. Similarly, while LCD panel prices were increasing in 2003 and 2004, LCD panel manufacturers' capacity growth rate was decelerating. Defendants' artificial supply restriction had the purposeful effect of fixing, raising, maintaining, or stabilizing LCD panel prices at artificially high levels.

123. Reducing production capacity is not something an LCD panel manufacturer would do unless its competitors were doing so as well. As AU Optronics executive Hsu Hsiung himself would later note when discussing defendants' cuts in production capacity in public statements made at a May 2006 annual international conference on Taiwan's flat panel display industry, reducing production capacity pushes an LCD panel manufacturer's fixed production costs up, and is not effective in fixing or maintaining the price of LCD panels unless the other defendants do so as well. Yet, as Mr. Hsiung himself noted in those public statements, an increase of 2 to 3 percent of AU Optronics' fixed production costs was preferable to a drop of 15 to 20 percent in LCD panel price.

124. Defendants' public statements admitting to their agreement to fix, maintain, and stabilize LCD panel prices continued. In late 2004, panel makers in Taiwan were reported to "agree the ultimate solution" to keep supply and demand in their favor was to "involve closer cooperation." For example, Chi Mei's Chairman, C.H. Lin, noted that mergers were not likely because of the large size of the companies in the industry, but he encouraged "a new era of mutual cooperation." He noted that the Japanese companies

Toshiba and Panasonic had done so, as had Samsung and Sony.

125. These public statements referenced an agreement among defendants to fix prices, and resulted in, among other things, a temporary halt in the expansion of production capacity among defendants. Because of this illegal agreement to fix, raise, and maintain LCD panel prices, defendants were able to maintain LCD panel prices at artificially high levels in 2005.

126. On a November 25, 2005 conference call with investors, Dr. Hui Hsiung, executive vice president of defendant AU Optronics, admitted to, conspiring with other LCD panel manufacturers to artificially increase the LCD panel prices. Discussing the "under supply/oversupply" of LCD panels, he noted "there's various actions we can take such as slightly reduce the capacity loading or shift the product mix," but predicted that, with respect to supply levels, "we will see some parity among different panel suppliers in 2006." In response to a question about what AU Optronics would do if demand turned out to be weaker than expected, Dr. Hsiung stated:

> Our policy, our strategy, has always been minimizing our inventory and that turned out to be quite successful in the past few years by keeping their inventory lower. And I think in the past we did have some problem convincing our competitors doing the same thing. But in recent months, especially this year, actually, it did start to happen. I think that the industry understand [sic] the benefit of keeping capacity low. Again, even if the scenario does happen that we have a 5% over capacity this is not the drastic action to reduce about 5% of the loading So, we think the

> industry become [sic] more mature. That is precisely what our competitors would do. (emphasis added)

127. Similarly, a November 3, 2005, Samsung presentation, available on its website, stated that "it was possible to secure a reasonable amount of profit while following industry leaders" during the conspiratorial period. This too constituted a public signal and invitation to the other defendants to fix prices by restricting output.

128. Thereafter, in the spring of 2006, at a conference of manufacturers of LCD panels in Taiwan, Mr. Hsiung publicly stated that the defendants should collectively look at cutting back on production from 100 percent to at least 85 percent. Otherwise, Mr. Hsiung said, if supply outpaced demand, manufacturers would be forced to cut prices. This was an express invitation to reduce output in order to raise, fix, stabilize, and peg the prices of LCD panels and LCD products.

129. In June of 2006, Mr. Hsiung told the Wall Street Journal that AU Optronics had cut production of LCD panels because of bloated inventories, a move that could bring more stability to LCD panel prices by the third quarter if other companies followed suit. Mr. Hsiung also told the Wall Street Journal, "You have to have discipline every month to adjust inventory. If others follow, that will help prices stabilize by the third quarter." Mr. Hsiung further said that buildup of LCD panel inventories led to a bigger than expected decline in prices recently. He urged other LCD panel makers to stop building up inventory during periods of oversupply. "Supply and demand balance can be maintained during a period of overcapacity if lab' loading is reduced by only 5 percent to

10 percent," he said, adding that a slight reduction would increase unit fixed costs by only 2 percent to 3 percent. Mr. Hsiung stated that AU Optronics was making efforts to cut manufacturing costs to prevent margin erosion. He added that further mergers and acquisitions were needed in the LCD panels industry to help stabilize prices. The foregoing statements were reported by the Wall Street Journal on June 15, 2006, in an article entitled "AU Optronics Cuts LCD Output in Bid to Stabilize Falling Prices." When Mr. Hsiung made these statements to the Wall Street Journal, he knew and intended that they would be publicly reported and would become known to all of the defendants; and, in making these statement, he intended to send a signal and an invitation to the other defendants to cut production in order to raise, fix, stabilize, and peg prices of LCD panels and LCD products.

130. Mr. Hsiung made his comments to the Wall Street Journal after defendant LGD LCD publicly announced that it was lowering its outlook for the second quarter because of high inventories of LCD panels. The President of defendant LGD LCD, Ron Wirahadiraksa, publicly stated on June 12, 2006, that the company would review its capacity plans for 2006. These statements were also signals and an invitation to the other defendants to curtail production of LCD panels and LCD products and thereby raise, fix, stabilize, and peg prices for LCD panels and LCD products.

131. Thereafter, defendants announced plans to cut back production. In the second half of 2006, LGD announced plans to cut its capacity expansion by two thirds; AU Optronics Corp announced plans to cut capital expanse by 30% to 40%; Chi Mei announced

plans to delay the mass-production date of its newest production plant; and HannStar adopted a "build to order" mode. These public statements and actions allowed defendants to continue to fix, maintain, and stabilize the price of LCD panels at artificially high levels.

132. Defendants had ample opportunities for collusion when they met and discussed pricing at various industry trade shows where all major participants in the LCD products industry were present. For example, on June 20 and June 21, 2001, a Market Seminar meeting was held at National Chiao Tung University, Hsinchu, Taiwan. The meeting was co-sponsored by DisplaySearch and the industry trade group, Semiconductor Equipment and Materials Institute ("SEMI"). The agenda stated that "this year's seminar will be expanded to two days and cover all major FPD [flat panel display] applications including notebook PCs, desktop monitors, LCD TVs, mobile phones, PDAs and internet appliances. Also covered will be the TFT LCD supply and demand, pricing, component shortages and the TFT LCD equipment and materials markets. In addition to DisplaySearch analysts, leading executives from FPD producers, OEMs, brands and equipment and materials suppliers are expected to be present."

133. Most, if not all, of the defendants were represented at this seminar at which discussions regarding LCD panel supply and pricing were held.

134. The express invitations to collude referred to herein above were in fact accepted, agreed to, and acted upon by the defendants, who, during the relevant time frame, repeatedly and continuously jointly and collusively limited output of LCD panels in order to raise, fix, and stabilize prices of LCD

panels and LCD products, each defendant knowing and understanding that the other defendants had agreed to do likewise and were doing likewise.

L. Government Investigations of Price-Fixing

135. In December 2006, authorities in Japan, Korea, the European Union and the United States revealed the existence of a comprehensive investigation into anti-competitive activity among LCD panel manufacturers.

136. In a December 11, 2006, filing with the Securities and Exchange Commission, defendant LGD disclosed that officials from the Korea Fair Trade Commission and Japanese Fair Trade Commission had visited the company's Seoul and Tokyo offices and that the United States Department of Justice had issued a subpoena to its San Jose office.

137. On December 12, 2006, news reports indicated that in addition to LGD, defendants Samsung, Sharp, Epson Electronics America, Inc. and AU Optronics were also under investigation.

138. The U.S. Department of Justice ("DOJ") acknowledged that it was "investigating the possibility of anti-competitive practices and is cooperating with foreign authorities."

139. These government investigations have the potential to result in hundreds of millions of dollars in fines. "Min Chun Hong, an analyst at Goodmorning Shinhan Securities, stated that if the companies [Samsung and LGD] were convicted, penalties could amount to about 200 billion won, or $216 million, each."

140. At least one of the defendants has approached the Antitrust Division of the DOJ to enter into a

leniency agreement with respect to the defendants' conspiracy to fix prices of LCD panels. In order to enter into a leniency agreement under the Corporate Leniency Policy of the Department of Justice, this defendant has reported the defendants' price-fixing conspiracy to the Department of Justice and has confessed its own participation in the defendants' price-fixing conspiracy.

141. On or about November 12, 2008, defendants LGD, Sharp, and Chunghwa agreed to plead guilty and pay a total of $585 million in criminal fines for their roles in the conspiracy to fix prices in the sale of LCD panels.

142. LG agreed to plead guilty and pay $400 million, the second-highest criminal fine ever imposed by the DOJ's Antitrust Division, and Chunghwa agreed to plead guilty and pay a $65 million criminal fine. LG admitted to participating in a conspiracy from September 2001 to June 2006 to fix the price of LCD panels sold worldwide, and to participating in meetings, conversations, and communications in Taiwan, Korea, and the United States to discuss the prices of LCD panels, agreeing to fix the prices of LCD panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices. Chungwa admitted to participating in a conspiracy from September 2001 to December 2006 to fix the price of LCD panels sold worldwide and to participating in meetings, conversations and communications in Taiwan to discus the prices of LCD panels, agreeing to fix the prices of LCD panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to agreed-upon prices.

143. Sharp agreed to plead guilty and pay a $120 million criminal fine. Sharp admitted to participating in a conspiracy with unnamed conspirators to fix the price of LCD panels sold to Dell from April 2001 to December 2006, to Apple Computer from September 2005 to December 2006, and to Motorola from fall 2005 to December 2006, and to participating in bilateral meetings, conversations, and communications in Japan and the United States with unnamed co-conspirators to discuss the prices of LCD panels, agreeing to fix the prices of LCD panels, and exchanging pricing and sales information for the purpose of monitoring and enforcing adherence to the agreed-upon prices.

144. In a December 9, 2009, press release the Department of Justice stated: "A Thin-Film Transistor-Liquid Crystal Display (TFT-LCD) producer and seller has agreed to plead guilty and pay $220 million in criminal fines for its role in a conspiracy to fix prices in the sale of liquid crystal display panels... According to a one-count felony charge filed today in U.S. District Court in San Francisco, Chi Mei Optoelectronics participated in a conspiracy to fix the prices of TFT-LCD panels sold worldwide from Sept. 14, 2001, to December 1, 2006....Including today's charges, as a result of this investigation, six companies have pleaded guilty or have agreed to plead guilty and have been sentenced to pay or have agreed to pay criminal fines totaling more than $860 million. Additionally, nine executives have been charged to date in the department's ongoing investigation." In a June 10, 2010, press release the Department of Justice said, "A federal grand jury returned a superseding indictment against the largest Taiwanese thin-film transistor-liquid display panels (TFT-LCD) producer and seller, its Houston-based American

subsidiary, and six of its executive for participating in a conspiracy to fix prices of TFT-LCD panels....As a result of this ongoing investigation, six companies have pleaded guilty and have been sentenced to pay criminal fines totaling more than $860 million. Additionally, including today's indictment, 17 executives have been charged to date in the department's ongoing investigation."

M. The Pass-Through of the Overcharges to Consumers

145. Defendants' conspiracy to raise, fix, or maintain the price of LCD panels at artificial levels resulted in harm to Plaintiff and other indirect-purchaser consumers in Mississippi because it resulted in their paying higher prices for products containing LCD panels than they would have in the absence of defendants' conspiracy. The entire overcharge for LCD panels at issue was passed on to Plaintiff and other Mississippi consumers. As the DOJ acknowledged in announcing the agreements to plead guilty by defendants LGD, Sharp, and Chunghwa, "These price-fixing conspiracies affected millions of American consumers who use computers, cell phones, and numerous other household electronics every day."

146. The defendants identified above as having attended CEO, Commercial, and/or working-group meetings made sure that so-called "street-prices" (i.e., consumer retail prices) of LCD products were monitored on a regular basis. The purpose and effect of investigating such retail market data was at least two-fold. First, it permitted defendants, such as Chungwa, which did not manufacture LCD products, the way defendant Samsung did, to police the price-fixing agreement to be sure that intra-defendant LCD

panel sales were kept at supra-competitive levels. Secondly, it permitted all defendants to police their price-fixing argument to independent OEMs who would reduce prices for furnished goods if there was a corresponding reduction in LCD panel prices from a defendant. As a result of street-pricing monitoring, defendants assured that 100% of the supra-competitive over—charges for LCD panels were passed on to indirect-purchaser consumers.

N. LCD Panels Make up a High Percentage of the Cost of Products Containing Such Panels

147. When an LCD panel leaves a defendant's manufacturing plant, it requires minimal additional labor or materials to make it into a TV or a computer monitor, or to install it into a laptop computer. The LCD panel itself typically accounts for 60-70% of the total retail price of a TV (even more for panels exceeding 40"), while comprising between 70-80% of the retail price of computer monitors. LCD panels typically comprise roughly 10% of the retail cost of a laptop computer.

148. The only differences between a computer monitor and a TV are the other materials added to make the finished products. For example, an LCD TV will have internal speakers and a TV tuner. There is no technological difference between a computer monitor's LCD panel and the LCD panel in a laptop.

149. To turn an LCD panel into an LCD monitor, an assembler fits the panel with a back light, plastic framing around the screen, and a power source. It is then branded by the OEM as its monitor, and sold to the end user—either directly from the OEM's store (like Gateway or Apple), on its website (like Dell or Hewlett-Packard), in an electronics store (like Best

Buy or Circuit City), or through a mass merchandiser (like Wal-Mart or Target). 197, To turn an LCD panel into an LCD TV, an assembler fits the panel with a TV tuner, speakers, and a power source.

150. To turn an LCD panel into a laptop, the panel is incorporated into a plastic frame, and a computer motherboard with its components is fitted into the bottom half of the frame. This is essentially the same process for iPods, which are essentially portable computers dedicated to media processing.

151. LCD panels are commodity products, with functionally equivalent products available from the defendants, who manufacture LCD panels pursuant to standard specifications and sizes.

O. The Price of Products Containing LCD Panels Was Directly Dependent on the Price of the Panels

152. The indirect-purchaser consumer buys products containing LCD panels through one of two distribution chains: either from the direct-purchaser OEM, such as Dell, or through a reseller such as Best Buy.

153. Computer and TV OEMs are not "manufacturers" at all, but assemblers of components and purveyors of brand names. For example, for computers, a company like HP or Apple does not make any of the parts that go into making an LCD monitor or laptop. Rather, such companies purchase LCD panels from defendants, and hire contract assemblers to turn the panels into the finished products. On information and belief, Computer and TV OEMs price their end-products on a "cost-plus" basis. Thus, changes in the cost of LCDs have immediate effects on the cost of the finished products.

154. On information and belief, there are two methods by which OEMs sell their branded LCD products to the retailer. The first method is to obtain pre-orders. These OEMs obtain prior orders for their products before they have them manufactured. Under this method, the TV or computer OEM obtains orders for its TVs, laptops, or computer monitors before it orders any of the parts for those products. It negotiates with retailers prices and quantities at which it will sell its finalized products to the retailers. The OEM will base its sales price on the current prices of the other components, the assembly costs, delivery costs, and a profit margin.

155. OEMs also sell their branded products to retailers by estimating the retail market for LCD products, and purchasing the LCD panels before the orders for the end product are obtained. Because the OEM is not locked in to an agreed-upon price for its product, it can pass through the entire overcharge unencumbered by downstream contracts.

156. In either case, because of the breadth of the price fixing conspiracy, the OEM is also not constrained by its competitors from passing on the overcharge. Because each OEM's end-product competitors are also buying LCD panels at supra-competitive prices from conspiracy members, no OEM faces end-product price competition from an OEM who is not paying supra-competitive prices for its LCD panel inputs. Neither prior price commitments nor end-product price competition interferes with the overcharge being passed on down the supply chain.

157. All supra-competitive overcharges are always passed through to the indirect-purchaser, end-user consumers such as Plaintiff and other Mississippi

consumers who pay more for a product containing LCD panels than in a competitive market place.

158. The price of products containing LCD panels is directly correlated to the price of LCD panels. The margins for OEMs are sufficiently thin that price increases of LCD panels force OEMs to increase the prices of their products.

159. OEMs and retailers of products containing LCD panels are all subject to vigorous price competition, whether selling TVs, computer monitors, or laptops. The demand for LCD panels is ultimately determined by purchasers of products containing such panels. The market for LCD panels and the market for products containing these panels are therefore inextricably linked and cannot be considered separately. Defendants are well aware of this intimate relationship, and use forecasts of TVs, laptops, and computer monitors to predict sales of LCD panels.

160. Because OEMs have thin net margins, they must pass on any increase in component costs, such that increases in the price of LCD panels lead to quick corresponding price increases at the OEM level for products containing such panels.

161. LCD panels are one of the most expensive components in products in which they are incorporated. As noted, the cost of an LCD panel in an LCD TV is 60-70% of the retail price; in a laptop is 10% of the retail price; and in a computer monitor is 70-80% of the retail price.

162. The computer industry is highly competitive. Computers arc commodities, with little or no brand loyalty, such that aggressive pricing causes consumers to switch preferences to different brands. Com-

puter prices are closely based on production costs, which are in turn directly determined by component costs, as assembly costs are minimal. OEMs accordingly use component costs, like the cost of LCD panels, as the starting point for all price calculations. Thus, computer prices closely track increases and decreases in component costs.

163. The close relationship between the price of LCD panels and products was recognized by the defendants during the conspiracy. Defendants monitored the prices of LCD products and the demand for LCD products during the relevant time frame. During several "Crystal" meetings referenced above, defendants specifically discussed "street" prices of LCD products and evinced concern that LCD panel increases would cause the price of LCD products to increase to such a degree that demand for LCD products would be affected.

164. Finally, many of the defendants and/or co-conspirators themselves have been and are manufacturers of TVs, monitors, and/or laptops containing LCD panels. Such manufacturers include, for example, Samsung, Sharp, Hitachi, LO Electronics, Philips Electronics, S-LCD, Sanyo, and Toshiba. Having agreed to fix the prices for LCD panels, the major component of the end products they were manufacturing, these defendants intended to pass on the full cost of this component in their finished products, and in fact did so. They agreed to fix prices of the major component of their TVs, monitors, and laptops with the understanding and expectation that the full cost of the LCD panels would be passed on to their customers in the prices of TVs, monitors, and laptops. To have agreed or to have done otherwise would have defeated the very purpose of the defendants' conspir-

acy. They did not agree to eliminate price competition at one level of production in order to implement it at another level.

P. The Effect of the Price of LCD Panels on the Price of Products Is Discernable Across the Economy

165. Once an LCD panel leaves its place of manufacture, it remains essentially unchanged as it moves through the distribution system. LCD panels are identifiable, discreet physical objects that do not change form or become an indistinguishable part of the TVs, computer monitors, laptops, or other products in which they are contained. And a given LCD product contains one and only one LCD panel.

166. Thus, LCD panels follow a traceable physical chain from the defendants to the OEMs to the purchasers of the finished products incorporating LCD panels.

167. Moreover, just as LCD panels can be physically traced through the supply chain, their price can also be traced to show that changes in the prices paid by direct purchasers of LCD panels affect prices paid by indirect purchasers of products containing LCD panels.

168. Because defendants control the market for LCD panels, there are virtually no choices for persons and businesses that require products containing such panels other than buying such products manufactured by a direct purchaser that paid supra-competitive prices for LCD panels to defendants because of defendants' conspiracy alleged herein.

169. When distribution markets are highly competitive, as they are in the case of products contain-

ing LCD panels as components, all of the overcharge will be passed through to ultimate consumers, such as Plaintiff and other Mississippi indirect-purchasers. In addition, as set forth in paragraph 158, supra., many of the defendants themselves manufacture, market, and distribute products including LCD panels, such as televisions (e.g., Samsung and Sharp) and computer monitors (e.g., Samsung) and laptops (e.g., Toshiba). This means that these defendants have passed through and will continue to pass through to their customers 100% of the supra-competitive price increases that resulted from the defendants' conspiracy, combination, and agreement to fix, increase, and stabilize the prices for LCD panels.

170. Hence, the inflated prices of products containing LCD panels resulting from defendants' price-fixing conspiracy have been passed on to Plaintiff and other Mississippi indirect purchasers by direct-purchaser manufacturers, distributors, and retailers.

171. During the relevant time frame, a number of large OEMs sold their products containing LCD panels directly to end-buyers. The OEM with the largest share of computer monitor and laptop sales in the United States market, Dell, sold exclusively to end-buyers, as did Gateway. During the conspiratorial period, Compaq and Apple also sold large portions of their laptops and computer monitors directly to the end-buyer. Dell has a 35.4% market share for LCD monitors.

172. Computer models sold by other OEMs to retailers were generally updated several times a year, and the price was changed for each new model. For example, for one large retailer, more than 90 percent of the computers sold during 2000 were either new

models or were sold at a different price from the price in the previous month. OEMs, retailers and distributors often use a "standard markup" method to set prices, meaning that they add a standard percentage to their own costs to determine selling prices. Thus, changes in the price of LCD panels were passed on rapidly rather than absorbed.

173. In retailing, it is common to use a "markup rule." The retail price is set as the wholesale cost plus a percentage markup designed to recover non-product costs and to provide a profit. This system guarantees that increases in costs to the retailer will be passed on to end buyers. For example, CDW, a large seller of LCD monitors and laptops, uses such a system. In general, CDW employs a "building block" approach to setting its advertised prices. The first building block is the Cost of Goods Sold (COGS), which represents the price CDW paid to acquire the product. CDW adds a series of positive markups to the cost to CDW to acquire a given product. These markups are in addition to the pass through effect of changes in the costs charged to CDW for that product by a given vendor.

174. As more fully explained in paragraphs 170, 171, and 172, below, the economic and legal literature has recognized that unlawful overcharges in a component normally result in higher prices for products containing that price-fixed component.

175. As Professor Herbert Hovenkamp, a noted antitrust scholar, has stated in his treatise, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE (1994) at 624:

> A monopoly overcharge at the top of a distribution chain generally results in higher prices at

> every level below. For example if production of aluminum is monopolized or cartelized, fabricators of aluminum cookware will pay higher prices for aluminum. In most cases they will absorb part of these increased costs themselves and pass part along to cookware wholesalers. The wholesalers will charge higher prices to the retail stores, and the stores will do it once again to retail consumers. Every person at every stage in the chain likely will be poorer as a result of the monopoly price at the top. Theoretically, one can calculate the percentage of any overcharge that a firm at one distributional level will pass on to those at the next level.

176. Similarly, two other antitrust scholars—Professors Robert G. Harris (Professor Emeritus and former Chair of the Business and Public Policy Group at the Haas School of Business at the University of California at Berkeley) and the late Lawrence A. Sullivan (Professor of Law Emeritus at Southwestern Law School and author of the Handbook of the Law of Antitrust)—have observed that "in a multiple-level chain of distribution, passing on monopoly overcharges is not the exception: it is the rule."

177. As Professor Jeffrey K. McKie-Mason (Arthur W. Burks Professor for Information and Computer Science and Professor of Economics and Public Policy at the University of Michigan), an expert who presented evidence in a number of the indirect purchaser cases involving Microsoft Corporation, said (in a passage quoted in a judicial decision in that case):

> As is well known in economic theory and practice, at least some of the overcharge will be passed on by distributors to end consumers, When the distribution markets are highly

> competitive, as they are here, all or nearly the entire overcharge will be passed on through to ultimate consumers... Both of Microsoft's experts also agree upon the economic phenomenon of cost pass through, and how it works in competitive markets. This general phenomenon of cost pass through is well established in antitrust laws and economics as well.

178. Quantitative correlation analysis strongly suggest that the market for products containing LCD panels is inextricably linked to the market for LCD panels by virtue of the strong correlation between the price of LCD panels and the price of LCD monitors, TVs, and laptop computers.

179. The purpose of the conspiratorial conduct of the defendants was to raise, fix or stabilize the price of LCD panels and, as a direct and foreseeable result, products containing such panels. Economists have developed techniques to isolate and understand the relationship between one "explanatory" variable and a "dependent" variable in those cases when changes in dependent variable are explained by changes in a multitude of variables—when all such variables may be changing simultaneously. That analysis-called regression analysis—is commonly used in the real world and in litigation to determine the impact of a price increase on one cost in a product (or service) that is an assemblage of costs. Thus, it is possible to isolate and identify only the impact of an increase in the price of LCD panels on prices for products containing such panels even though such products contain a number of other components whose prices may be changing over time. A regression model can explain how variation in the price of LCD panels affects changes in the price of products containing

such panels. In such models, rather than being treated as the dependent variable, the price of LCD panels is treated as an independent or explanatory variable. The model can isolate how changes in the price of LCD panels impact the price of products containing such panels while holding controlling for the impact of other price-determining factors.

180. Economic and legal literature recognizes that the more pricing decisions are based on cost, the easer it is to determine the pass-through rate. The directness of affected costs refers to whether an overcharge affects a direct (i.e. variable) cost or an indirect (i.e., overhead) cost. Overcharges will be passed-through sooner and at a higher rate if the overcharge affects direct costs. Here LCD panels are a direct (and substantial) cost of products containing such panels.

181. Other factors that lead to the pass-through of overcharges include: (I) whether price changes are frequent; (ii) the duration of the anti-competitive overcharge; (iii) whether pricing decisions are based on cost; (iv) whether the overcharge affects variable, as opposed to overhead, costs; (v) whether the re-sellers' production technology is uniform; (vi) whether the reseller supply curve exhibits a high degree of elasticity; and (vii) whether the demand of the resellers is inelastic. All of these factors were present in the LCD market during the relevant time frame. The precise amount of such an impact on the prices of products containing LCD panels can be measured and quantified. Commonly used and well-accepted economic models can be used to measure both the extent and the amount of the supra-competitive charge passed-through the chain of distribution.

182. Plaintiff and other indirect purchasers in Mississippi have been forced to pay supra-competitive prices for products containing LCD panels. These inflated prices have been passed on to them by direct purchaser manufacturers, distributors, and retailers. Those overcharges have unjustly enriched defendants.

ACTIVE CONCEALMENT

183. Defendants and their co-conspirators actively and fraudulently concealed the existence of their contract, combination or conspiracy. Because defendants' agreement, understanding and conspiracy were kept secret, Plaintiff was unaware of defendants' unlawful conduct alleged herein and did not know that State Agencies and other Mississippi consumers were paying artificially high prices for LCD panels and the products in which they were used.

184. The affirmative acts of the defendants alleged herein, including acts in furtherance of the conspiracy, were actively concealed and carried out in a manner that precluded detection.

185. By its very nature, defendants' price-fixing conspiracy was inherently self-concealing. As alleged above, defendants had secret discussions about price and output. Defendants agreed not to publicly discuss the existence or the nature of their agreement. In fact, the top executives who attended the CEO and Commercial Crystal Meetings agreed to stagger their arrivals and departures at such meetings to avoid being seen in public with each other and with the express purpose and effect of keeping them secret. Moreover, when the participants in those meetings became fearful that they might be subject to antitrust scrutiny, they agreed to the one-on-one so-called

"round robin" meetings described above to avoid detection.

186. Moreover, defendants repeatedly gave pretextual justifications for the inflated prices of LCD panels in furtherance of the conspiracy.

187. There have been a variety of other false, but purportedly market-based, explanations for price increases. The first was supply and demand. In early 1999, Omid Milani, a marketing manager for NEC, stated that "demand by far is outstripping our supply capability" and predicted that "prices will continue to increase until a reasonable balance is achieved." Boch Kwon, Vice President of LGD' Sales Division, and Yoon-Woo Lee, President and CEO of Samsung's Semiconductor Division, also falsely reported in 1999 that price increases were due to "acute" shortages. Another false rationale provided by defendants was undercapitalization. In 1999, Joel Pollack, a marketing manager for Sharp, stated: Prices have dropped at a steady rate over the past couple of years to the point where it was difficult to continue the necessary level of capitalization. The [low prices] have starved the industry.

188. A third rationale for the steep price hikes of 1999 was offered by Yoon-Woo Lee, CEO of Samsung. He claimed that the demand for larger panels was reducing the industry's capacity because each display used more square inches of motherglass substrate.

189. Increased demand was repeatedly cited by defendants throughout the conspiratorial period. On February 4, 2001, Bruce Berkoff, Executive Vice-President at LGD was quoted in News.com as saying that price increases were due to shortages. He claimed, "demand grew so fast that the supply can't

keep up." Koo Duk-Mo, an executive at LGD, similarly predicted in 1999 that prices would rise 10 to 15 percent due to increased demand for the holiday season. In 2005, Koo Duk-Mo of LGD stated "[w]e are seeing much stronger demand for large-size LCD TVs than expected, so LCD TV supply is likely to remain tight throughout the year."

190. Hsu Jen-Ting, a Vice-President at Chi Mei, and Chen Shuen-Bin, president of AU Optronics, offered another rationale for the 2001 price hike in an interview for the Taiwan Economic News in October 2001. They blamed "component shortages due to the late expansion of 5th generation production lines and new demand from the replacement of traditional cathode ray tubes with LCD monitors."

191. Regardless of when defendants' true conduct became known, limitations of actions periods do not run against the State of Mississippi for the claims raised in this complaint.

LEGAL BASIS FOR RELIEF

COUNT I

Violations of Mississippi Consumer Protection Act

192. Plaintiff incorporates and realleges; as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

193. Beginning at a time currently unknown to Plaintiff, but at least as early as January 1, 1996, and continuing through the filing of this Complaint, the exact dates being unknown to Plaintiff, defendants and their co-conspirators entered into a continuing agreement, understanding, and conspiracy in restraint of trade artificially to fix, raise, stabilize, and peg prices for LCD panels and LCD products in

the United States generally, and, in Mississippi, in particular, in violation of Miss. Code §§75-21-1, et seq. and Miss. Code §§ 75-24-1, et seq.

194. In formulating and carrying out the alleged agreement, understanding, and conspiracy, the defendants and their co-conspirators did those things that they combined and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above, and the following, among others:

a. Fixing, raising, stabilizing, and pegging the price of LCD panels; and, allocating among themselves and collusively reducing the production of LCD panels.

b. Price competition in the sale of LCD panels has been restrained, suppressed, and/or eliminated in the State of Mississippi;

c. Prices for LCD panels sold by defendants and their co-conspirators have been fixed, raised, maintained and stabilized at artificially high, non-competitive levels throughout the State of Mississippi;

d. Those, including the State of Mississippi, who purchased LCD panels directly or indirectly from defendants and their co-conspirators have been deprived of the benefits of free and open competition;

e. The economy of the State of Mississippi has been damaged;

f. Plaintiff and other Mississippi indirect purchasers have paid supra-competitive, artificially inflated prices for LCD products; and,

g. During the relevant time frame as a result of defendants' illegal conduct the intrastate commerce of the state of Mississippi has been substantially affected.

195. The Mississippi Consumer Protection Act makes unlawful unfair methods of competition, unfair trade practices and deceptive trade practices. Miss. Code §75-24-5(1). In particular, the CPA prohibits representing that goods or services have characteristics that they do not have. Miss. Code A §75-24-5(2). A characteristic of every commodity in our economy is its price, which is represented by every seller to every buyer that the product being sold is being sold at a legal, competitive, and fair market value.

196. Beginning on a date unknown to Plaintiff, but at least as early as January 1, 1996, and continuing thereafter at least up through the filing of this Complaint, defendants committed and continue to commit acts of unfair competition, unfair trade practices and deceptive trade practices, by engaging in the acts and practices specified above. Thus, Defendants and their co-conspirators represented that their LCD panels were priced at legal, competitive, and fair market value. This misrepresentation duped Plaintiff, its citizens, and its local governmental entities into paying illegal overcharges for over a decade.

197. Defendants' conduct as alleged herein violated Miss. Code §75-24-5. The acts, omissions, misrepresentations, practices and non-disclosures of defendants, as alleged herein, constituted a common, continuous, and continuing course of conduct of unfair competition as well as unfair and/or deceptive trade

practices, including, but not limited to, their violation of the Mississippi antitrust laws.

198. Defendants' acts, omissions, misrepresentations, practices, and non-disclosures, as described above, whether or not concerted or independent acts, are otherwise unfair methods of competition and unfair and/or deceptive trade practices.

199. The illegal conduct alleged herein is continuing and there is no indication that defendants will not continue such activity into the future.

200. But for the defendants' anti-competitive acts, Plaintiff would have been able to purchase LCD panels and LCD products at lower prices, and/or would have been able to purchase more capable, larger and/or higher performance LCD products than were actually offered for sale to them.

201. The unlawful and unfair business practices of defendants, as described above, have caused and continue to cause Plaintiff and other indirect Mississippi consumers to pay supra-competitive and artificially-inflated prices for LCD products. As a result of the misconduct described above, each purchase of an LCD product in Mississippi, therefore, constitutes a violation of Mississippi law.

COUNT II

Violations of Mississippi Antitrust Laws

202. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

203. Based on the foregoing factual allegations, defendants and their co-conspirators have violated Miss. Code § 75-21-1, by entering into a continuing agreement, understanding, and conspiracy in re-

straint of trade artificially to fix, raise, stabilize, and peg prices for LCD panels and LCD products in the United States generally, and, in Mississippi, in particular.

204. The illegal conduct alleged herein is continuing and there is no indication that defendants will not continue such activity into the future.

205. But for the defendants' anti-competitive acts, Plaintiff would have been able to purchase LCD panels and LCD products at lower prices, and/or would have been able to purchase more capable, larger and/or higher performance LCD products than were actually offered for sale to them.

206. The unlawful and unfair business practices of defendants, as described above, have caused and continue to cause Plaintiff and other indirect Mississippi consumers to pay supra-competitive and artificially-inflated prices for LCD products. As a result of the misconduct described above, each purchase of an LCD product in Mississippi, therefore, constitutes a violation of Mississippi law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this complaint would be received and filed and that after consideration thereof the Court would grant it the following relief:

A. That judgment be entered in favor of Plaintiff and against Defendants;

B. That the Court determine that defendants have violated the Mississippi Consumer Protection Act;

C. That the Court determine that defendants have violated Mississippi anti-trust laws;

D. That the Plaintiff, the State of Mississippi, be granted the following specific relief:

1. In accordance with Miss. Code §75-24-9 and 75-21-1 that defendants, their affiliates, successors, transferees, assignees, and the officers, directors, partners, agents, and employees thereof, and all other persons acting or claiming to act on their behalf or in concert with them, be permanently enjoined and restrained from in any manner continuing, maintaining, or renewing the conduct, contract, conspiracy or combination alleged herein, or from entering into any other conspiracy alleged herein, or from entering into any other contract, conspiracy or combination having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

2. In accordance with Miss. Code §75-24-19(1)(b) that the State of Mississippi be awarded civil penalties of Ten Thousand Dollars ($10,000.00) for each sale of an LCD product in Mississippi during the relevant time frame which was sold at an artificially inflated price as a result of the defendants' unfair methods of competition and/or unfair and/or deceptive trade practices; the State may be awarded additional penalties under § 75-2-7. In accordance with Miss. Code § 75-24-11 that defendants be ordered to restitute any and all monies to the State of Mississippi for its purchases of its purchases of LCD products and the purchases of its citizens,

3. That Plaintiff, bringing this action on behalf of the State of Mississippi in its proprietary capacity on its own behalf, and on behalf of Mississippi residents, including local governmental entities,

a. be awarded restitution and its damages in an amount according to proof;

b. be awarded punitive damages in accordance with Miss. Code § 11-1-65;

c. be awarded pre- and post-judgment interest as provided by law, and that such interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;

d. recover its costs of suit, including its reasonable attorney's fee, as provided by law; and

e. be awarded such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

DATED this 25th day of March, 2011.

JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Feb. 4, 2013]

No. 12-60704

STATE OF MISSISSIPPI,
ex rel Jim Hood, Attorney General,
Plaintiff - Appellee

v.

AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INCORPORATED; CHI MEI CORPORATION; CHIMEI INNOLUX CORPORATION, formerly known as Chi Mei Optoelectronics Corporation; CHI MEI OPTOELECTRONICS USA, INCORPORATED, formerly known as International Display Technology USA, Incorporated; CMO JAPAN COMPANY, LIMITED, formerly known as International Display Technology, Limited; HANNSTAR DISPLAY CORPORATION; HITACHI, LIMITED; JAPAN DISPLAY EAST, INCORPORATED; HITACHI ELECTRONIC DEVICES (USA); LG DISPLAY COMPANY, LIMITED, formerly known as LG Phillips LCD Company, Limited; LG DISPLAY AMERICA, INCORPORATED, formerly known as LGD LCD America, Incorporated; SAMSUNG ELECTRONICS COMPANY, LIMITED; SAMSUNG SEMICONDUCTOR, INCORPORATED; SAMSUNG ELECTRONICS AMERICA, INCORPORATED; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA MOBILE DISPLAY COMPANY, LIMITED, formerly known as Toshiba Matsushita Display Technology Company, Limited; TOSHIBA AMERICA ELECTRONIC COMPONENTS,

INCORPORATED; TOSHIBA AMERICA INFORMATION SYSTEMS, INCORPORATED,

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____, F.3d_____)

Before JOLLY, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

[Filed 06/09/11]

No. 3:11CV345CWR-FKB

Removed from:
Chancery Court of Hinds County, Mississippi
First Judicial District

Civil Action No. G2011-516 T/1

THE STATE OF MISSISSIPPI,
ex rel JIM HOOD, ATTORNEY GENERAL,
Plaintiff,

v.

AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INC. CHI MEI CORPORATION; CHI ME OPTOELECTRONICS CORPORATION; CHI MEI OPTOELECTRONICS USA, INC., f/k/a INTERNATIONAL DISPLAY TECHNOLOGY USA, INC.; CMO JAPAN CO., LTD., f/k/a INTERNATIONAL DISPLAY TECHNOLOGY LTD.; CHUNGHWA PICTURE TUBES LTD.; HANNSTAR DISPLAY CORPORATION; HITACHI, LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; LG DISPLAY CO., f/k/a LG PHILLIPS LCD CO., LTD.; LG DISPLAY AMERICA, INC. f/k/a LGD LCD AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA MOBILE DISPLAY CO., LTD.

f/k/a TOSHIBA MATSUSHITA DISPLAY TECHNOLOGY CO., LTD.; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; and TOSHIBA AMERICA INFORMATION SYSTEMS, INC.,

Defendants.

JOINT NOTICE OF REMOVAL

The undersigned Defendants AU Optronics Corporation; AU Optronics Corporation America, Inc.; Chi Mei Corporation; Chimei Innolux Corporation f/k/a Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Inc.; CMO Japan Co., Ltd.; HannStar Display Corporation; Hitachi, Ltd.; Hitachi Displays, Ltd.; Hitachi Electronic Devices (USA), Inc.; LG Display Co., Ltd.; LG Display America, Inc.; Samsung Electronics Co., Ltd.; Samsung Semiconductor, Inc.; Samsung Electronics America, Inc.; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Co., Ltd. f/k/a Toshiba Matsushita Display Technology Co., Ltd.; Toshiba America Electronic Components, Inc.; and Toshiba America Information Systems, Inc. (collectively, "Removing Defendants"),[1] hereby remove this action from the Chancery Court of the First Judicial District of Hinds County, Mississippi, to the United States District Court for the Southern District of Mississippi. This Court has original jurisdiction of this action pursuant to the Class Action

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[1] Although unanimous consent of all defendants is not required for removal under the Class Action Fairness Act pursuant to 28 U.S.C. § 1453(b), all named and served defendants join this removal. Defendant Chunghwa Picture Tubes Ltd. has not been served and has not signed a waiver of service.

Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), and federal question jurisdiction under 28 U.S.C. § 1331.

I. INTRODUCTION

1. On March 25, 2011, the Mississippi Attorney General, Jim Hood filed a complaint (the "Complaint") in the Chancery Court of the First Judicial District of Hinds County, Mississippi (the "Chancery Court"). The Complaint is attached as part of comprehensive Exhibit A, which consists of a true and correct copy of the pleadings and filings in the Chancery Court file of this action.

2. The Attorney General purports to bring claims in the name of the State of Mississippi on its own behalf, on behalf of local governmental entities, "on behalf of Mississippi citizens" and "on behalf of Mississippi residents" (collectively, the "Plaintiffs"). Compl. pp. 2, 54. In this Notice, the Removing Defendants will use "the State" to refer to all of the Plaintiffs. The Complaint alleges that the named Defendants and others engaged in a conspiracy to fix prices for liquid crystal display ("LCD") panels lasting from January 1, 1996 to December 11, 2006. Compl. ¶¶ 40, 49. The State alleges violations of the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-5, and Mississippi Antitrust Laws, Miss. Code Ann. § 75-21-1, *et seq.*, and seeks civil penalties under Miss. Code Ann. §§ 75-24-19(1)(b), 75-21-7, punitive damages under Miss. Code Ann. § 11-1-65, restitution and damages under Miss. Code Ann. § 75-24-11, and injunctive relief under Miss. Code Ann. §§ 75-24-9 and 75-21-1. Compl. pp. 50-54.

3. In April 2007, over 100 civil cases alleging price fixing of LCD panels, by the same manufacturers named as defendants in the State's Complaint,

were transferred and consolidated in a multidistrict litigation proceeding in the District Court for the Northern District of California. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827-SI (N.D. Cal. filed Apr. 20, 2007) (the "MDL"). If the Plaintiffs file a motion to remand this action to state court, this Court should decide the motion rather than the MDL. *Illinois ex rel. Lisa Madigan v. AU Optronics Corp.*, No. ILN/1:10-cv-05720 (J.P.M.L. Feb. 3, 2011), ECF No. 27 (order postponing decision on motion to vacate conditional transfer of the action to the MDL until the Northern District of Illinois rules on plaintiff's motion for remand to state court) (attached as Exhibit B).

II. NOTICE OF REMOVAL IS TIMELY

4. On May 10, 2010, the Defendants AU Optronics Corporation; AU Optronics Corporation America, Inc.; Chi Mei Corporation; Chimei Innolux Corporation f/k/a Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Inc.; CMO Japan Co., Ltd.; HannStar Display Corporation; Hitachi, Ltd.; Hitachi Displays, Ltd.; Hitachi Electronic Devices (USA), Inc.; LG Display Co., Ltd.; LG Display America, Inc.; Samsung Electronics Co., Ltd.; Samsung Semiconductor, Inc.; Samsung Electronics America, Inc.; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Co., Ltd. f/k/a Toshiba Matsushita Display Technology Co., Ltd.; Toshiba America Electronic Components, Inc.; and Toshiba America Information Systems, Inc. (collectively, "Stipulating Defendants") and the Mississippi Attorney General filed a stipulation in the Chancery Court whereby the Stipulating Defendants agreed to waive service of the Complaint under Federal Rule of Civil Procedure 4(d) and the laws of

Mississippi, including the Mississippi Rules of Civil Procedure § 4(e), *et seq.*, and the Mississippi Attorney General agreed to extend the time for Defendants to answer, move to dismiss or otherwise respond to the Complaint until after a decision is rendered on a motion to remand this action to state court. This Stipulation is included in Exhibit A to this Notice.

5. Pursuant to 28 U.S.C. § 1446(b), this Notice of Removal is being filed within thirty days of first receipt by any defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the state court proceeding is based.[2]

III. THE STATE'S ACTION IS REMOVABLE UNDER CAFA

6. This action is removable to federal court under CAFA, 28 U.S.C. §§ 1332(d) and 1453. The action is removable both as a "class action" under 28 U.S.C. § 1332(d)(2) and as a "mass action" under 28 U.S.C. § 1332(d)(11).

A. This Court Has Jurisdiction Over this Action as a "Class Action."

7. Removal is proper because this action is a "class action" within the meaning of CAFA. CAFA

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[2] Removing Defendants expressly reserve all defenses or contentions they may assert in this action, including, without limitation, lack of personal jurisdiction, insufficient service of process (except to the extent of the stipulation previously executed by the Removing Defendants), insufficient evidence or allegations to obtain class certification, and lack of subject matter jurisdiction. This notice of removal is not intended in any way to constitute an appearance or a waiver of service on behalf of any defendant, except to the extent of the stipulation previously executed by the Removing Defendants.

provides federal jurisdiction over "class actions," as defined therein, that arise solely under state law if there is minimal diversity of citizenship and the amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2), (5).

8. CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). This definition should be "interpreted liberally" and "lawsuits that resemble a purported class action should be considered a class action for the purpose of applying these provisions." *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) (quoting S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3). CAFA is intended to prevent "jurisdictional gamesmanship," and thus a court must "look to the substance of the action and not only at the labels that the parties may attach." *Id.* (quotation omitted). The identity of the real parties in interest in an action determines whether subject matter jurisdiction exists. *Id.* at 428; *see also Navarro Say. Assn v. Lee*, 446 U.S. 458, 460-61 (1980) ("a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy").

9. As in *Caldwell*, the Attorney General brings claims in a representative capacity "on behalf of Mississippi citizens" and "on behalf of Mississippi residents." Compl. pp. 2, 54. The Complaint seeks damages and restitution for injuries sustained by private Mississippi purchasers. *See, e.g.*, Compl. p. 2 ("Unaddressed [in the DOJ actions] is any form of

restitution for consumers or governmental entities which purchased products at an artificially inflated price.") (emphasis added); *id.* p. 12 ("As a result of defendants' illegal price-fixing agreement, Plaintiff and other *consumers in Mississippi* paid more for LCD products than they would have absent such illegal conduct.") (emphasis added); *id* p. 54 (that "Plaintiff, bringing this action . . . on behalf of Mississippi residents . . . be awarded restitution and its damages . . . .").

10. Furthermore, the Complaint seeks damages and restitution on behalf of local government entities, (Compl. pp. 2, 54), which are citizens for diversity jurisdiction purposes. *Moor v. County of Alameda*, 411 U.S. 693, 718 (1973); *Reeves v. City of Jackson*, 532 F.2d 491, 495 n.5 (5th Cir. 1976); *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1416-17 (5th Cir. 1996).

11. The individual Mississippi residents and local government entities who purchased LCD panels and products are the real parties in interest. Where a state attorney general asserts a claim for monetary damages based on injuries suffered by individuals, the Fifth Circuit has determined that those individuals are the real parties in interest for that claim. *Caldwell*, 536 F.3d at 429 (treating individuals, not the state, as the real parties in interest where Louisiana Attorney General's complaint made "clear that it is seeking to recover damages suffered by individual policyholders"). Because the Attorney General has filed this representative action on behalf of a group of unnamed Mississippi residents and citizens, it is an action brought "by 1 or more representative persons" and is therefore a CAFA class action. *Id.* at 430.

12. All the requirements for a CAFA class action are met here. The number of claimants in this action exceeds 100 persons. The Complaint states that this action is brought on behalf of each Mississippi resident and citizen who purchased a product such as a notebook computer or television set containing an LCD panel over a ten-year period. Compl. pp. 2, 54. By the Complaint's own count, this involves thousands (if not millions) of transactions. *Id.* ¶ 41.

13. In addition, no Defendant, as alleged in the Complaint, is a resident of Mississippi. *See* Compl. ¶¶ 3-31. The majority of the Defendants are foreign corporations incorporated and headquartered in Asia, including Taiwan (AU Optronics Corporation; Chi Mei Corporation; Chimei Innolux Corporation f/k/a Chi Mei Optoelectronics Corporation; Chunghwa Picture Tubes Ltd.; HannStar Display Corporation), Korea (LG Display Co., Ltd; Samsung Electronics Co., Ltd.) and Japan (CMO Japan Co., Ltd.; Hitachi, Ltd.; Hitachi Displays, Ltd.; Sharp Corporation; Toshiba Corporation; Toshiba Mobile Display Co., Ltd. f/k/a Toshiba Matsushita Display Technology Co., Ltd.). *Id.* Those Defendants with U.S. affiliates or sales agents are incorporated or have their principal place of business, even as alleged in the Complaint, in California (AU Optronics Corporation America, Inc.; Chi Mei Optoelectronics USA, Inc.; LG Display America, Inc.; Samsung Semiconductor, Inc.; Toshiba America Electronic Components, Inc.; Toshiba America Information Systems, Inc.), South Carolina (Hitachi Electronic Devices (USA), Inc.), New Jersey (Samsung Electronics America, Inc.; Sharp Electronics Corporation) and Texas (AU Optronics Corporation America, Inc.), not Mississippi. *Id.*

14. Because the real parties in interest reside in Mississippi and the Defendants, as alleged in the Complaint, are non-residents of Mississippi, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2) is met.

15. Finally, the aggregate amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2). While the Complaint does not explicitly quantify the damages sought, the State seeks damages for alleged overcharges on every LCD panel manufactured by all Defendants, and every product containing such a LCD panel, which would include televisions and notebook computers, purchased by any Mississippi resident over a 10-year period. Therefore, the damages sought on behalf of these Mississippi residents must exceed $5,000,000.

B. In the Alternative, this Action Is a "Mass Action" Removable Under CAFA.

16. In the alternative, this action is removable as a "mass action" under CAFA. *See* 28 U.S.C. § 1332(d)(11). CAFA defines a "mass action" for purposes of federal jurisdiction as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). As with a class action, a CAFA mass action requires monetary claims by 100 or more persons, an aggregate amount in controversy of at least $5,000,000, and plaintiffs who are at least minimally diverse from defendants. 28 U.S.C. § 1332(d)(11)(B)(i). A "mass action" also must satisfy the diversity jurisdictional amount requirements under 28 U.S.C. § 1332(a).

17. In *Caldwell*, the Fifth Circuit held that when an action is brought by the State on behalf of its people and the people are the real parties in interest, the action is a mass action under CAFA. 536 F.3d at 430. Such is the case here.

18. As set forth above, the citizens and residents of Mississippi are the real parties in interest to this action and they number over 100.

19. These citizens' and residents' claims involve common questions of law under the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-5, and Mississippi Antitrust Laws, Miss. Code Ann. §§ 75-21-1, *et seq.*, and common questions of fact based on alleged agreements to fix the prices for LCD panels. Compl. ¶¶ 192-206.

20. As set forth above, the diversity requirement of CAFA is met.

21. As set forth above, the $5,000,000 statutory threshold is met.

22. A case can proceed in federal court under CAFA mass action jurisdiction if the amount in controversy exceeds $75,000 in damages. 28 U.S.C. § 1332(d)(11)(B)(i). This requirement is satisfied because the aggregate "punitive damages" sought by the Plaintiffs is almost certain to be more than $75,000. *See Allen v. R. & H. Oil & Gas Company*, 63 F.3d 1326, 1335-36 (5th Cir. 1995); *Montgomery v. First Family Fin. Servs., Inc.*, 239 F. Supp. 2d 600 (S.D.Miss. 2002) (finding that unspecified demand for punitive damages satisfies jurisdictional demand).

23. Furthermore, local government entities are also citizens for diversity jurisdiction purposes. In the Complaint, the Attorney General purports to repre-

sent all local governmental entities, which would include cities, counties, community hospitals, school districts, waste water districts, utility districts, economic development authorities, and other local government entities. Especially in light of "punitive damages" sought by Plaintiffs, the matter in controversy for one or more, if not all, of these Plaintiffs, based on their allegations, exceeds $75,000.

24. Additionally, Mississippi seeks damages "on behalf of Mississippi residents," Compl. p. 54, and thus appears to be asserting claims on behalf of resident corporations and associations as well as individual persons. Especially in light of "punitive damages" sought by Plaintiffs, the matter in controversy for one or more, if not all, of these Plaintiffs, based on their allegations, exceeds $75,000.

C. This Court has Supplemental Jurisdiction over the Remainder of the State's Claims.

25. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the State's claims for injunctive relief, civil penalties, restitution and damages on behalf of the State and its agencies. Compl. pp. 2, 52-55.

IV. THIS COURT HAS JURISDICTION BECAUSE THE COMPLAINT PRESENTS A FEDERAL QUESTION.

26. Under 28 U.S.C. § 1331, United States district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

27. The federal removal statute specifically provides for the removal of "[a]ny civil action of which the district courts have original jurisdiction founded

on a claim or right arising under the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1441(b). The statute further provides that the district court may also hear any otherwise non-removable claims asserted in such an action. *See* 28 U.S.C. § 1441(c).

28. Although a plaintiff is generally the master of his complaint, there are exceptions to that rule. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 773 (5th Cir. 2003) ("The well-pleaded complaint rule, however, is not without its exceptions."). A "*state claim* may be removed to federal court ... when a federal statute wholly displaces the state-law cause of action through complete pre-emption". *Id.* at 773 (emphasis in original) (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)). Furthermore, "courts will not permit [a] plaintiff to use artful pleading to close off [a] defendant's right to a federal forum . . . [and] the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiffs' characterization." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 n.2 (1981) (citation and quotations omitted). Therefore, "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial*, 539 U.S. at 8.

29. In this case, the State has pleaded its claims under Mississippi law to prevent a federal claim under the Sherman Act, 15 U.S.C. § 7 et seq. Mississippi Antitrust Laws apply only to intrastate activity. *Standard Oil Co. of Ky. v. State ex rel. Att'y Gen.*, 65 So. 468, 470-71 (Miss. 1914), *overruled on other grounds by Mladinich v. Kohn*, 164 So. 2d 785 (Miss.

1964). Here, however, the Complaint's state antitrust claim is based on alleged conspiratorial conduct occurring outside the U.S. and transactions occurring in interstate commerce. Thus, these claims actually arise under the Sherman Act.

30. Since the *Beneficial* and *Hoskins* decisions, the Fifth Circuit has not decided whether a Mississippi state antitrust claim based on interstate activity is preempted by the Sherman Act. *Cf. Terrebonne v. SMA Health Plan, Inc.*, 271 F.3d 186 (5th Cir. 2001) (finding no preemption of a Louisiana antitrust claim under an outdated standard). After the Fifth Circuit's *Terrebonne* decision, the Supreme Court decided *Beneficial*, and the Fifth Circuit later adopted the *Beneficial* standard in *Hoskins* and reversed its position on preemption regarding other statutory areas. Although the Fifth Circuit has not applied the *Beneficial* standard in the antitrust context since *Terrebonne*, other courts have found preemption of state antitrust claims made with factual allegations similar to those in the Complaint. *See, e.g., H-Quotient. Inc. v. Knight Trading Grp*, No. 03 Civ. 5889 (DAB), 2005 WL 323750, at *4 (S.D.N.Y. Feb. 9, 2005) ("Where the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce, it is clear that federal antitrust laws operate to preempt the field and oust state courts of jurisdiction.") (citation and quotations omitted); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 82 (E.D.N.Y. 1980) (stating that where interstate commerce is involved, federal antitrust laws preempt state antitrust laws). Because this Court should similarly find that the federal antitrust laws preempt the Complaint's claims that are based on interstate conduct and transactions with little to no impact on

local or intrastate commerce, this case presents a federal question and removal is appropriate.

31. To the extent there are any claims that are primarily based on intrastate conduct and transactions, this Court has supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367.

V. ALL OTHER REMOVAL PREREQUISITES HAVE BEEN MET

32. As required by 28 U.S.C. § 1446(a), a true and correct copy of the Complaint is included in Exhibit A.

33. A true and correct copy of the stipulation filed in the Chancery Court on May 10, 2010 described above, is included in Exhibit A.

34. True and correct copies of all other process, pleadings or papers that have been received by Defendants or filed in the Chancery Court, as of the date of this Notice of Removal, are included in Exhibit A.

35. Under 28 U.S.C. § 1441(a), the United States District Court for the Southern District of Mississippi is the federal district court for the district and division embracing the place where the state court suit is pending.

36. Pursuant to 28 U.S.C. § 1446(d), all adverse parties are being provided with written notice of the filing of this Notice of Removal.

37. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the Clerk of the Chancery Court of the First Judicial District of Hinds County, Mississippi.

38. Defendants reserve the right to amend or supplement this Notice of Removal.

WHEREFORE, Removing Defendants remove the above-captioned case from the Chancery Court of the First Judicial District of Hinds County, Mississippi, to this Court.

Dated: June 9, 2011

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REPLY BRIEF

Supreme Court, U.S.
FILED
MAY 6 - 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES AND RULE 29.6 STATEMENT

The Petition for Writ of Certiorari included as Respondents the following entities that have since been voluntarily dismissed in the district court: Hitachi, Limited; Japan Display East, Incorporated (formerly known as Hitachi Displays, Limited); and Hitachi Electronic Devices (USA), Incorporated. The remaining disclosures made in the Petition remain accurate.

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INTRODUCTION

There can be no doubt that certiorari should be granted in this case. The Brief for Respondents (Resp. Br.) acknowledges that "the petition presents an intractable conflict among the circuits on a recurring question of national importance." Resp. Br. at 1. Respondents also agree that "the circuit split has become intolerable because courts of appeals have issued conflicting decisions even in cases involving the same alleged conduct by the same defendants." *Id.* "And Respondents agree that the issue presented here has percolated through the courts sufficiently that it is ripe for this Court's review." *Id.* Respondents conclude that "[t]his is a compelling case for the Court's review," and "the Court should grant the petition." *Id.* at 12, 13.

Even Respondents AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc.—who have their own petition for certiorari pending in the related case of No. 12-911, *AU Optronics Corp. v. South Carolina*—urge this Court to grant certiorari in this case.

Accordingly, this Court should grant the instant Petition on the basis of Petitioner's Question Presented and hold No. 12-911 pending the decision in this case.

ARGUMENT

A. This Case Is The Best Vehicle To Review The Question Presented.

Respondents acknowledge that "[t]his case comes to the Court on a clean record with the issue crisply presented in a way that will enable the Court to resolve the circuit conflict and provide authoritative guidance to the lower courts." Resp. Br. at 24.

Respondents do not dispute that the instant Petition is the best vehicle for deciding the Question Presented. Pet. at 6-7. The Fifth Circuit's approach has been disavowed by every other court of appeals to consider the question, and yet in the decision below the Fifth Circuit reaffirmed its precedent and its conflict with three other circuits.

Moreover, this case involves a full complement of defendants in the LCD litigation, whereas No. 12-911 involves only AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc. Because all defendants are represented here, this case is the better vehicle.

Further, as noted by amicus Public Citizen in support of the Petition (and as Respondents do not question), this case involves counsel (on both sides) with extensive experience before the Court, who will ensure that the issue is ably briefed and argued. Public Citizen Amicus Br. at 4-5. In short, this case is the best vehicle to review the Question Presented.

B. Respondents' Attempt To Reframe The Question Presented Is Improper.

While acknowledging that certiorari is warranted, Respondents object to the manner in which Petitioner has drafted the Question Presented. Resp. Br. at 1. Yet this Court has instructed that a petitioner generally has the prerogative to frame the question as he or she wishes. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992) ("A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. While we have on occasion rephrased the question presented by a petitioner, or requested the parties to address an important question of law not raised in the petition for certiorari, by and large it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." (citations omitted)).

The Question Presented by Petitioner is clearly and fairly stated, and Respondents' criticisms are misplaced.

1. The Question's Reference To A "*Parens Patriae* Action" Is Proper.

First, Respondents quibble about the wording of the Question Presented, on the ground that it "presumes that this case is a '*parens patriae* action' and that the State has 'common-law authority to assert all claims in the complaint.'" Resp. Br. at 1 (quoting Pet. at i). Respondents contend that "Petitioner's question presented leapfrogs over the

issue of identifying the 'real' parties in interest." *Id.* at 15.

Respondents' contention that Petitioners have "leapfrogged" over the "real" party in interest issue is remarkable, given that an entire section of the Petition is devoted to the dimensions and application of the real party in interest test. *See* Pet. at 20-24 (Part II(B)).

More generally, Respondents' attempt to reframe the Question Presented is simply spin. The Fifth Circuit decided the federal question regarding the removability of the Attorney General's lawsuit under CAFA, without denying (or even reaching) the Attorney General's statutory and common-law authority to bring the action. Rather, the Fifth Circuit held that, regardless of the Attorney General's *parens patriae* authority, the lawsuit met the CAFA definition of a "mass action":

> After analyzing the complaint, the relevant statutes, and the *parens patriae* authority of the State, we hold that the real parties in interest in this suit include both the State and individual consumers of LCD products.

Pet. App. at 8a-9a.

This case therefore presents the federal question of whether such a lawsuit by a state attorney general is a "mass action" subject to removal under CAFA. The plain text inquiry will be whether this case is an action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly," within the meaning of 28 U.S.C. § 1332(d)(11)(B)(i). This Court can decide that question without reaching issues of Mississippi law

regarding the Attorney General's statutory or common-law authority, which this Court ordinarily would not review in any event. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 628, 636 (1875). As this case comes to the Court, the sole question presented is a federal one—the proper interpretation of CAFA. That is exactly what Petitioner's Question Presented provides.

As part of their criticism of the phrasing of the Question Presented, Respondents allude (Resp. Br. at 1-2) to the following passage in the Fifth Circuit's decision:

> *Even assuming arguendo that the State has parens patriae standing to bring the claims here (an issue that we do not decide), that standing does not change the fact that* Mississippi is acting, not in its *parens patriae* capacity, but essentially as a class representative.

Pet. App. at 7a (emphasis added).[1] Significantly, however, Respondents omit the emphasized portion of the Fifth Circuit's opinion. Resp. Br. at 1-2. Read as a complete sentence, the passage makes clear that the Fifth Circuit was not questioning or deciding the Attorney General's *parens patriae* authority to bring the instant lawsuit. The Court of Appeals simply decided as a matter of federal law that Mississippi's lawsuit was removable under CAFA.

In short, there is no merit to Respondents' argument that the Question Presented by Petitioner

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[1] Most telling is the inherent contradiction between this "class representative" *dicta* and the Fifth Circuit's analysis and holding, in the same opinion, that Mississippi's suit "does not qualify as a 'class action' under the CAFA." Pet. App. at 3a.

somehow "presumes" its own answer. Resp. Br. at 1. The Question fairly and accurately frames the federal law issue before this Court.

2. Respondents' Proposed Question Is Flawed.

Respondents propose their own question presented, which this Court should reject. It is Petitioner's prerogative to frame the question. *See Yee*, 503 U.S. at 535. Further, Respondents' question stacks the deck by ignoring all aspects of Mississippi's complaint except for what Respondents describe as "monetary relief claims on behalf of particular citizens of the State." Resp. Br. at i. Respondents thereby overlook the State's proprietary claim, its injunctive relief and civil penalties claims, and also the quasi-sovereign interest of the State, acting through the Attorney General, which the complaint makes clear. Resp. App. at 2a-3a, 65a-66a.

As for the non-proprietary restitution sought, the "monetary relief" asserted in the complaint does not constitute "claims" of individual citizens or consumers, as suggested by Respondents' proposed question, but rather the State's own "claim" stemming from the Attorney General's independent statutory authority and the State's quasi-sovereign capacity. The statutory provisions on which the State relies for its claim are different from and independent of the provisions on which a private individual or consumer would rely for a damages claim.[2] In fact, the complaint states that "Plaintiff,

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[2] The Mississippi Antitrust Act (MAA) provides direct statutory authority for the Attorney General to pursue both monetary and injunctive relief ("suits at law or in equity") in the name of the State "to enforce the civil features of the

the State of Mississippi" seeks "its damages" and "restitution," which may include disgorgement, to be awarded to "Plaintiff, the State of Mississippi," not to individual purchasers. Resp. App. at 65a-66a.

Moreover, Respondents' proposed question should be rejected because it improperly conflates the definitions of "class actions" and "mass actions," which are two separate categories in CAFA. *Compare* 28 U.S.C. § 1332(d)(1)(B) (definition of "class action"), *with id.* § 1332(d)(11)(B) (definition of "mass action"). Respondents seek to transplant the phrase "persons (named or unnamed)" from the definition of *class action* to the definition of *mass action*. Resp. Br. at 3-4.[3] Their proposed question

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antitrust laws." Miss. Code. Ann. § 75-21-37. Only acts "inimical to public welfare" are subject to enforcement, *id.* § 75-21-1, and thus Mississippi's monetary claims are necessarily based on harm *to the public*. Although the MAA creates a private right to enforce the antitrust laws and to seek personal recovery of damages and a $500 penalty, *id.* § 75-21-9, the complaint does not seek relief pursuant to that section of the statute. Similarly, the Mississippi Consumer Protection Act (MCPA) provides direct statutory authority for the Attorney General to bring an action for injunctive relief, *id.* § 75-24-9, and, in the context of that action, to obtain "additional orders or judgments, including restitution," *id.* § 75-24-11. Like the MAA, the MCPA creates a separate, auxilliary private right to recover personal monetary losses. *Id.* § 75-24-15. Again, Mississippi has never asserted that its claim for recovery arises under section 75-24-15.

[3] Respondents suggest by sleight-of-hand that "mass action" and "class action" are interchangeable because mass actions are "deemed" class actions pursuant to subsection (d)(11)(B). But contrary to Respondents' glossing, that determination is a two-step process. A removing party must prove that the definition of mass action is independently satisfied before it may be "deemed" a class action. Congress clearly stated that the reason that a "mass action" is deemed a

then implicitly refers back to this notion of "unnamed" persons by using the phrase "on behalf of." *Id.* at i. Because of the potential confusion created by Respondents' phrasing, their proposed question should be rejected.

3. Respondents' Attempt to Expand The Question Should Be Rejected.

Respondents also seek to reframe the Question Presented to enable the Court to address a second question: "whether 'class action' cases under 28 U.S.C. § 1332(d)(1)(B) should be evaluated for purposes of minimal diversity under the claim-by-claim or whole case approaches." Resp. Br. at 25. There is no reason to reframe the Question to permit that expansion. There is no conflict among the circuits with respect to the additional question that Respondents seek to argue. *See* Pet. App. at 2a-3a (holding that action by attorney general not brought under Rule 23 or other similar rule of judicial procedure is not "class action" under CAFA); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–13 (2d Cir. 2013) (same); *LG Display Co. v. Madigan*, 665 F.3d 768, 771–72 (7th Cir. 2011) (same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848–49 (9th Cir. 2011) (same); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174–77 (4th Cir. 2011) (same).

Therefore, the issue before this Court should be limited to Petitioner's Question Presented:

"class action" is not so that their definitions could be muddled together, but rather so that, if the definition of mass action were met, such a case would also be "removable under paragraphs (2) through (10)." 28 U.S.C. § 1332(d)(11)(A). Without this "deeming" language in subsection (d)(11)(A), mass actions would not be removable.

whether this case qualifies as a "mass action" pursuant to 28 U.S.C. § 1332(d)(11)(B)(i). This is the issue at the core of the circuit split.

C. Respondents' Merits Arguments Are Premature.

Unsurprisingly, Respondents state that they "strongly disagree with Petitioner" as to "the merits of how" the question presented should be resolved—although they agree that the question is one of "national importance." Resp. Br. at 1. Of course, consideration of the merits is premature at this stage, and Respondents' attempt to preview their position should be disregarded.

Respondents' merits arguments are also flawed on their own terms. Respondents purport to focus on the text of CAFA. *Id.* at 16-17. But they overlook the key statutory language, which refers to civil actions "in which monetary relief claims of 100 or more persons are *proposed to be tried jointly* on the ground that the *plaintiffs'* claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The instant action does not involve a "joint trial" of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." The trial will involve the claims of the Attorney General, not an aggregated set of the State's citizens. CAFA's definition of a mass action is plainly aimed at cases involving the joinder of multiple plaintiffs in a single suit.

Respondents also ignore the fact that the text of CAFA presupposes the existence of individually identifiable plaintiffs whose claims do not meet the jurisdictional prerequisite and would therefore have to be remanded, while the claims of others remain in

federal court. *See id.* § 1332(d)(11)(B) ("jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements").

This provision makes plain that attorney general actions do not constitute "mass actions" under CAFA. In a *parens patriae* case, there are no individually identifiable "plaintiffs"; the state, acting through the attorney general, is the sole plaintiff. Nor is it practical for a court to examine the circumstances of each citizen of the state and to remand to state court claims of particular plaintiffs whose claims would not meet the federal diversity amount-in-controversy requirement. Yet under Respondents' approach, district courts would be obligated to identify the citizens who might benefit from the lawsuit and remand those whose potential claims did not exceed $75,000, an impossible task, particularly in an action on the scale of the present case.

Respondents cite CAFA's legislative history, Resp. Br. at 17, but it proves the opposite of what they claim. Committee reports on both the House and Senate bills described the "mass actions" that would be deemed class actions as "suits that are brought on behalf of hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part." H.R. Rep. No. 108-144, at 35 (2003) (emphasis added); *see also* S. Rep. No. 108-123, at 42 (2003).

Respondents assert that Congress "considered and rejected" an amendment that would have clarified that CAFA was not applicable to actions

brought by a state attorney general. Resp. Br. at 17. But Respondents fail to acknowledge that CAFA's sponsors opposed the amendment not because they intended CAFA to cover *parens patriae* actions, but because the amendment was "unnecessary," as it was "perfectly clear" that the bill would not apply to *parens patriae* actions, which were "excluded from the reach of the bill." 151 Cong. Rec. at S1163, S1164 (Sen. Hatch). Each of the other CAFA proponents who spoke in opposition to Senator Pryor's amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id.* at S1160 (Sen. Specter), S1161 (Sen. Carper), S1161-62 (Sen. Cornyn), S1163 (Sen. Grassley).

Respondents claim that the whole-case approach is impermissibly "subjective." Resp. Br. at 20-22. Yet that approach is the majority rule, followed by every circuit outside the Fifth, and has proven fully administrable.

Respondents also ask the Court, without citing any authority, to ignore decades of legal precedent regarding the "real party in interest" test, which requires a court to determine if the State is merely a nominal party. Pet. at 20-24. Respondents contend that CAFA's minimal diversity requirement mandates a different approach. Resp. Br. at 22-24. But there is no reason to interpret CAFA as altering the longstanding test. The "real party in interest" inquiry does not vary based on whether diversity jurisdiction is minimal or complete. Only *after* a court determines that the party is nominal does the basis for diversity jurisdiction become relevant. Accordingly, this case is governed by the presumption that "Congress expects its statutes to be read in conformity with

this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

Respondents have little to say regarding the important principles of federalism at issue in this case, the need for a strict construction of removal statutes, and the recurring jurisdictional battles and administrative complexity that Respondents' approach would entail. Pet. at 24-33. These considerations are compelling reasons to grant review and to reverse the judgment below.

CONCLUSION

The Petition for Writ of Certiorari should be granted on the basis of Petitioner's Question Presented.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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March 2013

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of consumer protection laws involves both governmental litigation, such as the state *parens patriae* action at issue here, and private enforcement through individual lawsuits and class actions. Public Citizen has a longstanding interest in preserving the viability of each of these distinct mechanisms for protection of the rights of consumers and members of the public generally.

Public Citizen also has an interest in the proper construction of the jurisdictional provisions of the Class Action Fairness Act (CAFA). Public Citizen was an active participant in the legislative process leading to CAFA's enactment, and although opposing the bill in general, played a part in and closely followed the discussions that led to many of the compromises that were incorporated in the legislation as finally enacted. Public Citizen is particularly concerned that the Fifth Circuit's construction of CAFA's "mass action" provision to encompass state *parens patriae* actions departs from the plain language and intent of CAFA. Public Citizen believes that its perspective on CAFA's lan-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief. All counsel received 10 days' notice of filing. Letters of consent to filing from counsel for all parties are on file with the Clerk.

guage and history may be of assistance to the Court in considering both the importance of this case and the degree to which the decision below has distorted CAFA—considerations that bear heavily on the decision whether to grant review in this case.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review in This Case to Resolve a Significant Conflict Among the Circuits.

The conflict among the circuits over the question whether a statutorily authorized *parens patriae* action is a "mass action" subject to removal under CAFA provides more than ample reason for a grant of certiorari in this case. The conflict is direct, and the positions of the circuits are irreconcilable, as evidenced by the opposite results reached by other circuits in cases involving claims based on exactly the same alleged price-fixing scheme at issue here. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012); *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011).

This overt conflict cannot be explained away on the basis of some difference in the nature of the authority exercised by the state officials bringing the actions. In this case, the attorney general of the state of Mississippi has brought suit under statutes expressly authorizing actions seeking injunctive relief and civil penalties, as well as recovery of damages, on behalf of the state itself, as well as under his *parens patriae* authority to seek recoveries on behalf of injured citizens of the state. *See* Pet. 20, nn.14–15. The Fifth Circuit, following its previous decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), held that such an action is a mass action

under CAFA because the "real parties in interest" with respect to some of the claims are individual citizens of the state. Cases brought under statutory and common-law authority of exactly the same nature, with a similar mix of claims for relief on behalf of the state and for recoveries that may ultimately benefit individuals, have been held not to be mass actions by the Fourth, Ninth, and Seventh Circuits. *AU Optronics v. South Carolina*, 699 F.3d at 393–94; *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 669–70 (9th Cir. 2012); *Madigan*, 665 F.3d at 771. Those decisions, moreover, have explicitly rejected the decisional rule applied by the Fifth Circuit in this case—namely, its so-called "claim by claim" approach to determining the "real party in interest" in such cases. *See AU Optronics v. South Carolina*, 699 F.3d at 394; *Nevada v. Bank of Am. Corp.*, 672 F.3d at 670; *Madigan*, 665 F.3d at 773.

The conflict is by now thoroughly entrenched. In the court below, Judge Elrod's concurring opinion pointed out the conflict among the circuits and, while recognizing that the panel was bound by the holding of *Caldwell*, urged the court as a whole to "reconsider that precedent and adopt a different approach for analyzing the removal of *parens patriae* suits under CAFA." Pet. App. 22a. The Fifth Circuit's denial of rehearing en banc in the face of Judge Elrod's call for reconsideration of precedent indicates that the court below will not, left to its own devices, bring its rule into conformity with the standards applied by the majority of the other circuits. Moreover, because the competing arguments have been thoroughly fleshed out in the opinions of a substantial number of appellate and district courts, there is no reason to let the conflict simmer in the lower courts any longer.

The issue is important and recurring. In the space of only five years, a significant number of cases presenting the issue have reached the appellate courts (as have an equally significant number raising the related issue of whether *parens patriae* actions should be treated as conventional class actions under CAFA, *see Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–13 (2d Cir. 2013) (citing cases)). A number of others have been decided at the district court level. *See* Pet. 30 (citing cases). The number of cases reflects that state attorneys general are very active in bringing litigation that combines claims seeking injunctions and penalties for violations of state statutes with claims for monetary relief for the benefit of both the state itself (which often is injured by antitrust violations, unfair trade practices, and the like in its capacity as a consumer as well as its sovereign capacity) and injured citizens.

Until this Court resolves the issue, such cases will be treated radically differently in the Fifth Circuit than they are in the Fourth, Seventh and Ninth Circuits, and defendants in other circuits will continue to raise the issue by attempting to remove state *parens patriae* actions under CAFA. Whether such actions may proceed in the state courts chosen by state officials as the appropriate fora for assertion of their claims or may instead be imposed on the federal courts at the election of defendants is an important question that demands resolution by this Court.

This case is a particularly apt choice for resolving the issue, which is also before the Court in No. 12-

911, *AU Optronics Corp. v. South Carolina*.[2] Here, the Attorney General of Mississippi has associated counsel with substantial experience and expertise in proceedings before this Court, helping to ensure that both sides of the issue will be very ably presented to the Court, as review of the petition confirms.

II. The Fifth Circuit's Decision Is Contrary to CAFA's Text and Purposes.

A. The Plain Language of Section 1332(d)(11) Excludes *Parens Patriae* Actions from the Definition of Mass Actions.

Review of the decision below is particularly appropriate because the decision is incorrect and, if allowed to stand, would plunge both the federal and state courts into a procedural morass as they attempted to deal with the complexities inherent in recasting a state officer's *parens patriae* action as a mass action under CAFA.

As the Seventh Circuit recognized in *Madigan*, the Fifth Circuit's "claim by claim" approach to determining the "real parties in interest" in a *parens patriae* action is not only incorrect, but beside the point: The plain language of CAFA's mass action provision forecloses the possibility of federal jurisdiction over a *parens patriae* action filed by a state attorney general. *See Madigan*, 665 F.3d at 772.

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[2] The petition in that case seeks review of the Fourth Circuit's opinion in *AU Optronics v. South Carolina*, 699 F.3d 385, one of the appellate decisions that directly conflicts with the decision of the Fifth Circuit below.

The mass action provision is an exception to the principle that "class actions" under CAFA include only "civil action[s] filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Every court of appeals to have considered the issue has agreed that that definition does not encompass a *parens patriae* action, which is not brought under Rule 23 or any of its state analogs. *See Purdue Pharma*, 704 F.3d at 212-13.

CAFA's mass action provision, 28 U.S.C. § 1332(d)(11)(A), however, expands CAFA's jurisdiction over class actions to include a narrow category of cases that are not class actions by providing that a mass action shall also "be deemed to be a class action" for CAFA jurisdictional purposes (if it otherwise meets CAFA's jurisdictional requirements). CAFA goes on to define a mass action as "any civil action" (other than a true class action filed under Rule 23 or a state analog) "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(B)(i).

This definition on its face does not encompass a *parens patriae* suit. Such an action does not propose a "joint trial" of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." Although a *parens patriae* action may involve an effort by the state to obtain relief that will ultimately benefit individual citizens of the state who have been injured, the action encompasses the claims of a single

plaintiff—the state, proceeding through its relator, the attorney general. The idea that a complaint advancing such a plaintiff's claims can be described as proposing a "joint trial" of the claims of multiple plaintiffs stretches English usage further than the language allows. The terms used in CAFA's definition of a mass action are plainly aimed at describing cases involving "the joinder of multiple plaintiffs in a single suit." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 763 (7th Cir. 2008).

That mass actions under CAFA include only actions where claims of multiple named plaintiffs are joined for purposes of trial is confirmed not only by the plain language of the primary definition of the term, but also by the limitation on federal jurisdiction that immediately follows and is incorporated in the statutory definition: "except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [of section 1332]." 28 U.S.C. § 1332(d)(11)(B)(i). This language not only presupposes the existence of individually identifiable "plaintiffs," but also imposes, at a minimum, an obligation on a court to remand claims of any particular plaintiffs whose claims would not meet the amount-in-controversy requirement for conventional diversity jurisdiction under § 1332(a).[3]

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[3] The lower courts have not resolved whether establishing that there are individual plaintiffs whose claims exceed $75,000 is part of the defendant's threshold burden to establish the propriety of removal. *Compare Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (remanding case where defendant failed to show that even one plaintiff had claims whose value exceeded $75,000), *with Lowery v. Alabama Power Co.*, 483 F.3d 1184, (*Footnote continued*)

As the Eleventh Circuit has recognized, the language of the "except" clause refers "to individual plaintiffs and their claims." *Lowery*, 483 F.3d at 1205. The clause unambiguously reflects Congress's intent that the mass action provision apply to instances where individual named plaintiffs have filed claims jointly (or proposed a joint trial of separately filed actions). Only in that circumstance does it make sense to provide that jurisdiction is limited to those plaintiffs whose claims would otherwise be subject to jurisdiction under §1332(a).

Indeed, implementing the statutory command that claims of individual plaintiffs that do not meet the amount-in-controversy requirement of § 1332(a) be remanded to state court would prove a procedural nightmare if the Fifth Circuit's view that *parens patriae* actions are mass actions were to prevail. The district court would be obligated either to identify the individual citizens who might ultimately receive relief if the state's claims were successful and remand those whose potential claims did not exceed $75,000, or else to remand to the state court a parallel *parens patriae* action on behalf of those citizens with losses not ex-

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1203–07 (11th Cir. 2007) (expressing doubt that showing the existence of plaintiffs with claims exceeding $75,000 is a threshold requirement). Nonetheless, there is no disagreement that individual plaintiffs whose claims do not exceed $75,000 are outside of federal jurisdiction, and their claims must be remanded to state court if they are included in a mass action otherwise subject to removal under CAFA. *See also* S. Rep. No. 109-14, at 47 (2005) ("[A]ny claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court.")

ceeding $75,000, while retaining only a *parens patriae* action seeking recoveries to benefit citizens with losses exceeding $75,000. The first alternative would likely be impossible, or at least extremely burdensome, while the second would result in significant duplication of effort between the state and federal court systems. Adding to these complexities, the state's own claims for damages that *it* suffered, as well as claims for penalties and injunctive relief as to which the state is concededly the real party in interest, would also likely require remand, as they do not fall within federal jurisdiction under § 1332(a). And at the end of the day, any resolution of whatever part of the case remained in the federal system would not be binding on any person who lacked an individual claim that was not subject to jurisdiction under § 1332(a).

B. CAFA's History Confirms What Its Language Provides: *Parens Patriae* Actions Are Not Mass Actions.

That Congress did not intend the strange consequences described above is confirmed not only by the language of the mass action provision, but also by CAFA's legislative history. The forerunner of the mass action provision first appeared in a version of CAFA introduced in the House of Representatives in the 107th Congress, which provided that a civil action that is not otherwise a class action (because not filed under Rule 23 or one of its state analogs) would be "deemed" a class action if "monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact." H.R. 2341, 107th Cong. § 4(a)(2) (2001). The bill's sponsor explained that the provision

was aimed at actions in which a "multitude of plaintiffs" sought relief. H.R. Rep. No. 107-370, at 97 (2002) (statement of Rep. Goodlatte in Committee mark-up session).

Versions of CAFA introduced in both the House and Senate in the 108th Congress included similar provisions. *See* H.R. 1115, 108th Cong. § 4(a)(2) (2003); S. 274, 108th Cong. § 4(a)(2) (2003). Committee reports on both bills confirmed what the plain language of the bills indicated: The statutory language is aimed at actions in which claims of individually identified plaintiffs are joined for purposes of trial. In virtually identical language, the reports described the "mass actions" that would be deemed to be class actions as "suits that are brought on behalf of hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part." H.R. Rep. No. 108-144, at 35 (2003) (emphasis added); *see* S. Rep. No. 108-123, at 42 (2003) (using identical language except for the addition of "simultaneously" before "in a single proceeding").

The House Report also included the bill's sponsor's explanation that the mass action provision was aimed in large part at mass joinder proceedings in Mississippi and West Virginia state courts, in which mass actions had been "used to consolidate for trial the claims of as many as 8,000 plaintiffs ...." H.R. Rep. No. 108-144, at 94. The sponsor explained that mass actions were effectively "opt-in class actions in the sense that they *include only those claimants who*

have affirmatively consented to the inclusion of their claims in the action." *Id.* at 92 (emphasis added).

CAFA's definition of mass actions was altered to its final form—actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332] subsection (a)"—later in the 108th Congress, in S. 2062 (2004). The legislation ultimately enacted as CAFA in the 109th Congress, Pub. L. No. 109-2 (2005), was identical to S. 2062. Although the wording was slightly different from that in the bills that were the subjects of the 2003 House and Senate Reports, the differences, including the explicit references to "plaintiffs," made even clearer that the provision was aimed at cases in which claims of individual named plaintiffs were joined.

The Senate Report on the legislation as finally enacted, moreover, again referred to mass actions as "suits that are brought on behalf of numerous *named plaintiffs* who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status," and it explained that under the mass action provision, "any civil action in which 100 or more *named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes." S. Rep. No. 109-14, at 46 (2005) (emphasis added).

The drafting history thus underscores what the statutory language itself makes plain: The mass ac-

tion provision applies to cases in which claims of multiple named plaintiffs are joined. *Parens patriae* actions by state attorneys general do not meet that description.

Indeed, the statute's history reveals that in the final debates over CAFA, Congress considered and decisively rejected the possibility that the statutory language might provide for federal jurisdiction over *parens patriae* actions. When CAFA reached the Senate floor for final consideration in February 2005, Senator Pryor introduced an amendment that would have provided that the term "class action" in CAFA's jurisdictional provisions would "not include any civil action brought by, or on behalf of, any [state] attorney general." 151 Cong. Rec. S1157 (Feb. 9, 2005). As Senator Pryor explained, the amendment was not intended to alter CAFA's scope, but merely to "clarif[y]" it, *id.* at S1158, to address concerns expressed by state attorneys general that the statute might be "misconstrued" to apply to *parens patriae* actions. *Id.* (quoting letter from 46 state attorneys general).

CAFA's sponsors opposed the amendment not, as they carefully explained, because they intended CAFA to cover *parens patriae* actions, but because the amendment was "unnecessary," *id.* at S1163 (Sen. Hatch), as it was "perfectly clear" that the bill would not apply to parens patriae actions, which were "excluded from the reach of the bill." *Id.* at S1164. Each of the other CAFA proponents who spoke in opposition to Senator Pryor's amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id.* at S1160 (Sen. Specter), S1161 (Sen.

Carper), S1161-62 (Sen. Cornyn), S1163 (Sen. Grassley). Senator Grassley's remarks are typical:

> [I]n my judgment, the amendment is not necessary. I will explain. State attorneys general have authority under the laws of every State to bring enforcement action to protect their citizens. Sometimes these law[suit]s are parens patriae cases, similar to class actions in the sense that the State attorney general represents the people of that State. In other instances, their actions are brought directly on behalf of that particular State. But they are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes.
>
> One reason this amendment is not necessary is because our bill *will not affect those lawsuits*.

Id. (emphasis added).

In short, CAFA's supporters unanimously disclaimed any intent to bring *parens patriae* actions within federal jurisdiction. Accordingly, Senator Pryor's amendment was rejected. *Id.* at S1165. The debate over the amendment strongly underscores what is evident from the text of the statute and the explanations offered in the committee reports: CAFA does not authorize a *parens patriae* action to be deemed a class action for purposes of CAFA jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2013

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-1036

IN THE

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STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEB. 19, 2013
CERTIORARI GRANTED MAY 28, 2013

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion dated November 21, 2012 of the United States Court of Appeals, Fifth Circuit – State of Mississippi, ex rel. Jim Hood, Attorney General v. AU Optronics Corporation, et al. 1a

Order dated May 3, 2012 of the United States District Court, S.D. Mississippi – State of Mississippi, ex rel. Jim Hood, Attorney General v. AU Optronics Corporation, et al. 23a

Judgment dated November 21, 2012 of the United States Court of Appeals, Fifth Circuit – State of Mississippi, ex rel. Jim Hood, Attorney General v. AU Optronics Corporation, et al. 61a

Order Denying Rehearing dated February 4, 2013 of the United States Court of Appeals, Fifth Circuit – State of Mississippi, ex rel. Jim Hood, Attorney General v. AU Optronics Corporation, et al. 63a

The following documents appear on the following pages in the appendix to the Brief for Respondents in response to the petition for a writ of certiorari:

Plaintiff's Complaint, *State ex rel. Hood v. AU Optronics Corp.* (filed Mar. 25, 2011) 1a

Joint Notice of Removal, *Mississippi ex rel. Hood v. AU Optronics Corp.* (filed June 9, 2011) 70a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 12-60704 **Docketed:** 09/13/2012

Nature of Suit: 3410 Antitrust **Termed:** 11/21/2012

State of Mississippi v. AU Optronics Corporation, et al
Appeal From: Southern District of Mississippi, Jackson
Fee Status: fee paid

Case Type Information:
1) Private Civil Federal
2) Private
3)

Originating Court Information:

District: 0538-3 : 3:11-CV-345
Originating Judge: Carlton W. Reeves, U.S. District Judge
Date Filed: 06/09/2011
Date NOA Filed: 09/13/2012 **Date Rec'd COA:** 09/13/2012

Prior Cases:
12-90051 **Date Filed:** 05/14/2012
Date Disposed: 09/13/2012 **Disposition:** Dismissed

Current Cases:
None

Panel Assignment:
Panel: EGJ EBC JWE
Date of Hearing: 10/05/2012 **Date of Decision:** 11/21/2012
Date Completed: 11/21/2012

* * *

09/13/2012 PRIVATE CIVIL FEDERAL CASE docketed. NOA filed by Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited. [12-60704] (SEP)

09/13/2012 PERMISSION TO APPEAL GRANTED. Case transferred from miscellaneous case number 12-90051. Fee due on 09/24/2012 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated,

Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation, Toshiba Mobile Display Company, Limited. Notice of Certified ROA due on 09/28/2012. [12-60704] (SEP)

* * *

09/14/2012 NOTICE RECEIVED FROM DISTRICT COURT. ROA Certified by DCt, FILED. Certified ROA due deadline satisfied. [12-60704] (SEP)

09/14/2012 LETTER filed by Appellants Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited Notice of payment of appeal fees to District Court Clerk.. Date of Service: 09/14/2012 via US mail - Attorney for Appellants: Bangasser, Hester, Kim-Szrom, Sorenson, Wyant; email Attorney for Appellants: Beckett, Black, Boone, Chung, Crawford, Elfand, Emerson, Frahn, Gerity, Grenfell, Heidelberg, Lazerwitz, McAhren, Miller, Munford, Nedeau, Roger, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Anderson, Bloodgood, Cialkowski, Hedberg; hand delivery Attorney for Appellees: Aldridge, Morgan, Neville [12-60704] REVIEWED AND/OR EDITED. LETTER filed advising that the filing fee has been paid in district court. [12-60704] (Michael Brunson Wallace)

09/17/2012 FEE PAID by Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei

Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited. Fee deadline satisfied [12-60704] (SEP)

09/17/2012 CASE CALENDARED for oral argument on Friday, 10/05/2012, at 10:00 am in New Orleans at the John Minor Wisdom Federal Courthouse, 600 Camp Street. [12-60704 (GAM)

09/17/2012 UNOPPOSED MOTION filed by Appellants Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited to file record excerpts in excess pages [7183144-2]. Date of service: 09/17/2012 via US mail - Attorney for Appellants: Bangasser, Boone, Chung, Elfand, Emerson, Frahn, Gerity, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Miller, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Bloodgood, Cialkowski, Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Crawford, Heidelberg, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Morgan [12-60704] (Charles Edwin Ross)

* * *

09/19/2012 RECORD ON APPEAL FILED. Electronic

Pleadings, 2; ROA deadline satisfied. [12-60704] (SDH)

* * *

09/20/2012 APPELLANT'S BRIEF FILED by Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited Date of service: 09/20/2012 via US mail Attorney for Appellants: Bangasser, Boone, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Bloodgood, Cialkowski, Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Crawford, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Morgan [12-60704] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied Paper Copies of Brief due on 09/26/2012 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation, Toshiba Mobile Display Company,

Limited. [12-60704] (Michael Brunson Wallace)

09/20/2012 RECORD EXCERPTS FILED by Appellants Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited. Date of service: 09/20/2012 via US mail - Attorney for Appellants: Bangasser, Boone, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Bloodgood, Cialkowski, Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Crawford, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Morgan [12-60704] REVIEWED AND/OR EDITED.. Record Excerpts NOT Sufficient as they require a table of contents; exceeds optional page limit. # of Copies Provided: 0 Sufficient Record Excerpts due on 09/28/2012 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation, Toshiba Mobile Display Company, Limited [12-60704] (Michael Brunson Wallace)

* * *

09/24/2012 MOTION filed by Appellants CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation and Sharp Electronics Corporation, AU Optronics Corporation and AU Optronics Corporation America to file record excerpts in excess pages [7188131-2]. Date of service: 09/24/2012 via US mail Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Bloodgood, Cialkowski, Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Morgan [12-60704] REVIEWED AND/OR EDITED. UNOPPOSED MOTION filed by Appellants AU Optronics Corporation and AU Optronics Corporation America, Incorporated to file record excerpts in excess pages [7188131-2]. Date of service: 09/24/2012. [12-60704] (Stephen Lee Thomas)

09/24/2012 CLERK ORDER granting motion to file record excerpts in excess pages. filed by Appellants Samsung Electronics Company Ltd, AU Optronics Corporation, AU Optronics Corporation America, Incorporated, Chi Mei Corporation, Chimei Innolux

Corporation, Chi Mei Optoelectronics USA, Incorporated, CMO Japan Company, Limited, Hannstar Display Corporation, Hitachi, Limited, Japan Display East, Incorporated, Hitachi Electronic Devices (USA), LG Display Company, Limited, LG Display America, Incorporated, Samsung Semiconductor, Incorporated, Samsung Electronics America, Incorporated, Sharp Corporation and Sharp Electronics Corporation [7188131-2] The clerk is granting your unopposed motion for the Court subject to possible reconsideration by the merit panel at a later date (SEND MOTION, LETTER, AND RECORD EXCERPTS TO SCREENING JUDGE AND PANEL). [12-60704] (SEP)

09/24/2012 RECORD EXCERPTS MADE SUFFICIENT filed by Appellants Toshiba Corporation, Toshiba Mobile Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704 [7186502-2]. Sufficient Record Excerpts deadline satisfied. Paper Copies of Record Excerpts due on 09/25/2012 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America

Information Systems, Incorporated, Toshiba Corporation, Toshiba Mobile Display Company, Limited. [12-60704] (SEP)

09/24/2012 TRANSCRIPT ORDER received from Appellants Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited advising transcript unnecessary for appeal purposes (no hearings held). [12-60704] (SEP)

* * *

09/25/2012 APPELLEE'S MEMORANDUM BRIEF FILED by Appellee State of Mississippi Date of service: 09/25/2012 via US mail Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Bloodgood, Cialkowski, Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Morgan [12-60704] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED Brief NOT Sufficient as it requires a corrected caption which contains our complete caption. # of Copies Provided: 0 E/Res's Brief deadline satisfied. Sufficient Brief due on 09/28/2012 for Appellee State of Mississippi. [12-60704] (Meredith McCollum Aldridge)

09/25/2012 Paper copies of appellant brief filed by Appellants Toshiba Corporation, Toshiba Mobile Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704

received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-60704] (SDH)

09/25/2012 Paper copies of record excerpts filed by Appellants Toshiba Corporation, Toshiba Mobile Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [12-60704] (SDH)

* * *

09/27/2012 DOCUMENT RECEIVED NO ACTION TAKEN. No action will be taken at this time on the brief received from Appellee State of Mississippi because it is a duplicate filing. Counsel was instructed to email their sufficient brief. [12-60704] (SDH)

* * *

09/28/2012 BRIEF MADE SUFFICIENT filed by Appellee State of Mississippi in 12-60704 [7189951-2]. Sufficient Brief deadline satisfied. Paper Copies of Brief due on 10/01/2012 for Appellee State of Mississippi. [12-60704] (SDH)

* * *

09/28/2012 APPELLANT'S REPLY BRIEF FILED by Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited Date of service: 09/28/2012 via US mail Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-

Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Morgan [12-60704] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 10/02/2012 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company Ltd, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation, Toshiba Mobile Display Company, Limited. [12-60704] (Michael Brunson Wallace)

* * *

10/01/2012 Paper copies of appellee brief filed by Appellee State of Mississippi in 12-60704 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-60704] (SDH)

10/02/2012 Paper copies of appellant reply brief filed by Appellants Toshiba Corporation, Toshiba Mobile

Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-60704] (SDH)

* * *

10/05/2012 ORAL ARGUMENT HEARD before Judges Jolly, Clement, Elrod. Arguing Person Information Updated for: David Michael Cialkowski arguing for Appellee State of Mississippi; Arguing Person Information Updated for: Charles Edwin Ross arguing for Appellant Incorporated Toshiba America Electronic Components, Appellant Incorporated Toshiba America Information Systems, Appellant Toshiba Corporation, Appellant Limited Toshiba Mobile Display Company, And all other appellants[12-60704] (SME)

11/13/2012 COURT DIRECTIVE ISSUED. For good cause and in the interests of justice, the Court extends the deadline for ruling on this matter for ten (10) days. See 28 U.S.C. 1453(c)(3)(B). [12-60704] (SEP)

11/21/2012 PUBLISHED OPINION FILED. [12-60704 Reversed and Remanded] Judge: EGJ , Judge: EBC , Judge JWE [12-60704] (JMA)

11/21/2012 JUDGMENT ENTERED AND FILED. [12-60704] (JMA)

11/21/2012 MANDATE ISSUED FORTHWITH. [12-60704] (SBS)

* * *

12/05/2012 BILL OF COSTS filed by Appellants Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited. [12-60704] (Michael Brunson Wallace)

12/05/2012 PETITION filed by Appellee State of Mississippi for rehearing en banc [7244256-2]. Date of Service: 12/05/2012 via US mail - Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Freitas, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Morgan [12-60704] (Meredith McCollum Aldridge)

* * *

12/06/2012 PAPER COPIES REQUESTED for the petition for rehearing en banc filed by Appellee State of Mississippi in 12-60704 [7244256-2]. Paper Copies of Rehearing due on 12/11/2012 for Appellee State of Mississippi. [12-60704] (DDV)

12/10/2012 Paper copies of petition for rehearing en banc filed by Appellee State of Mississippi in 12-60704 received. Paper copies match electronic version of document? Yes # of Copies Provided: 20. Paper Copies of Rehearing due deadline satisfied. [12-60704] (SDH)

12/17/2012 COURT DIRECTIVE ISSUED requesting the appellants to file a response to the petition for rehearing en banc [7244256-2] filed by Appellee State

of Mississippi in 12-60704. [7252418-2] Response/Opposition deadline updated to 01/04/2013. [12-60704] (SEP)

12/18/2012 APPROVED BILL OF COSTS ISSUED to USDC. [12-60704] (SDH)

01/04/2013 RESPONSE/OPPOSITION filed by Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited [7263762-1] to the petition for rehearing en banc filed by Appellee State of Mississippi in 12-60704 [7244256-2] Date of Service: 01/04/2013 via US mail Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Freitas, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Hood, Morgan. [12-60704] REVIEWED AND/OR EDITED. RESPONSE/OPPOSITION filed by AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company, Limited, Samsung Semiconductor, Incorporated, Sharp Corporation and Sharp Electronics Corporation [7263762-1] to the court

directive requesting a response to the [7252418-2] petition for rehearing en banc filed by Appellee State of Mississippi in 12-60704 [7244256-2]. Response/Opposition deadline satisfied. Paper Copies of Response to Petition for Rehearing En Banc due on 01/14/2013 for Appellants AU Optronics Corporation, AU Optronics Corporation America, Incorporated, CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company, Limited, Samsung Semiconductor, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited. Date of Service: 01/04/2013. [12-60704] (Charles Edwin Ross)

01/09/2013 Paper copies of response/opposition filed by Appellants Samsung Electronics Company, Limited, AU Optronics Corporation, AU Optronics Corporation America, Incorporated, Chi Mei Corporation, Chimei Innolux Corporation, Chi Mei Optoelectronics USA, Incorporated, CMO Japan Company, Limited, Hannstar Display Corporation, Hitachi, Limited, Japan Display East, Incorporated, Hitachi Electronic Devices (USA), LG Display Company, Limited, LG Display America, Incorporated, Samsung Semiconductor, Incorporated, Samsung Electronics America, Incorporated, Sharp Corporation, Sharp Electronics Corporation, Toshiba

Corporation, Toshiba Mobile Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704 received. Paper copies match electronic version of document? Yes # of Copies Provided: 20. Paper Copies of Response to Petition for Rehearing En Banc due deadline satisfied. [12-60704] (SDH)

01/10/2013 OPPOSED MOTION filed by Appellee State of Mississippi to recall this Court's mandate. Date of service: 01/10/2013 via US mail - Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Freitas, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Hood, Morgan [12-60704] (Meredith McCollum Aldridge)

01/10/2013 OPPOSED MOTION filed by Appellee State of Mississippi for leave to file a reply [7268785-2] to the response/opposition filed by Appellants Samsung Electronics Company, Limited, AU Optronics Corporation, AU Optronics Corporation America, Incorporated, Chi Mei Corporation, Chimei Innolux Corporation, Chi Mei Optoelectronics USA, Incorporated, CMO Japan Company, Limited, Hannstar Display Corporation, Hitachi, Limited, Japan Display East, Incorporated, Hitachi Electronic Devices (USA), LG Display Company, Limited, LG Display America, Incorporated, Samsung Semiconductor, Incorporated, Samsung Electronics America, Incorporated, Sharp Corporation, Sharp

Electronics Corporation, Toshiba Corporation, Toshiba Mobile Display Company, Limited, Toshiba America Electronic Components, Incorporated and Toshiba America Information Systems, Incorporated in 12-60704 [7263762-2]. Date of service: 01/10/2013 via US mail Attorney for Appellants: Bangasser, Chung, Elfand, Emerson, Frahn, Grenfell, Hester, Kim-Szrom, Lazerwitz, McAhren, Nedeau, Roger, Sorenson, Wyant; Attorney for Appellees: Hedberg, Neville; email Attorney for Appellants: Beckett, Black, Boone, Crawford, Freitas, Gerity, Hawkins, Heidelberg, Miller, Munford, Ross, Shelson, Thomas, Thomas, Wallace; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Hood, Morgan [12-60704] (Meredith McCollum Aldridge)

01/17/2013 RESPONSE/OPPOSITION filed by Toshiba America Electronic Components, Incorporated, Toshiba America Information Systems, Incorporated, Toshiba Corporation and Toshiba Mobile Display Company, Limited [7273945-1] to the motion for leave to file a reply filed by Appellee State of Mississippi in 12-60704 [7268785-2], motion to recall mandate filed by Appellee State of Mississippi in 12-60704 [7268784-2] Date of Service: 01/17/2013 via email - Attorney for Appellants: Bangasser, Beckett, Black, Boone, Chung, Crawford, Elfand, Emerson, Frahn, Freitas, Gerity, Grenfell, Hawkins, Heidelberg, Hester, Kim-Szrom, Lazerwitz, McAhren, Miller, Munford, Nedeau, Roger, Ross, Shelson, Sorenson, Thomas, Thomas, Wallace, Wyant; Attorney for Appellees: Aldridge, Anderson, Bloodgood, Cialkowski, Hedberg, Hood, Morgan, Neville. [12-60704] REVIEWED AND/OR EDITED. RESPONSE/ OPPOSITION filed by AU Optronics Corporation, AU Optronics Corporation America, Incorporated,

CMO Japan Company, Limited, Chi Mei Corporation, Chi Mei Optoelectronics USA, Incorporated, Chimei Innolux Corporation, Hannstar Display Corporation, Hitachi Electronic Devices (USA), Hitachi, Limited, Japan Display East, Incorporated, LG Display America, Incorporated, LG Display Company, Limited, Samsung Electronics America, Incorporated, Samsung Electronics Company, Limited, Samsung Semiconductor, Incorporated, Sharp Corporation and Sharp Electronics Corporation [7273945-1] to the motion for leave to file a reply filed by Appellee State of Mississippi in 12-60704 [7268785-2], motion to recall mandate filed by Appellee State of Mississippi in 12-60704. [7268784-2] Date of Service: 01/17/2013. [12-60704] (Charles Edwin Ross)

02/04/2013 COURT ORDER denying motion to recall mandate filed by Appellee State of Mississippi [7268784-2]; denying motion for leave to file a reply filed by Appellee State of Mississippi [7268785-2] Judge(s): JWE. [12-60704] (SDH)

02/04/2013 COURT ORDER denying petition for rehearing en banc filed by Appellee State of Mississippi [7244256-2] Without Poll. [12-60704] (SDH)

02/25/2013 SUPREME COURT NOTICE that petition for writ of certiorari [7301838-2] was filed by Appellee State of Mississippi on 02/19/2013. Supreme Court Number: 12-1036. [12-60704] (CAV)

05/28/2013 SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellee State of Mississippi in 12-60704 on 05/28/2013. [7373733-1] [12-60704] (LGL)

* * *

RELEVANT DOCKET ENTRIES

U.S. District Court
Southern District of Mississippi (Jackson)
CIVIL DOCKET FOR CASE #: 3:11-cv-00345-CWR-FKB

The State of Mississippi v. AU Optronics Corporation et al
Assigned to: District Judge Carlton W. Reeves
Referred to: Magistrate Judge F. Keith Ball
Case in other court: Chancery Court of Hinds County, Ms, G2011-516 T/1
Cause: 28:1331 Fed. Question

Date Filed: 06/09/2011
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
06/09/2011	1	NOTICE OF REMOVAL by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Mei Corporation, Chi Me Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co.,

		LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. from Chancery Court of Hinds County, Ms, case number G2011-516 T/1. (Filing fee $ 350 receipt number 34643010231) Pursuant to Rule L.U.Civ.R. 5(b): within 14 days removing party must electronically file the entire state court record as a single filing; and all parties shall, within fourteen days after the Case Management Conference, file as **separate docket items** any unresolved motions that were filed in state court which they wish to advance. (Attachments: # 1 Exhibit A - Lower Court Complaint, # 2 Civil Cover Sheet)(ND) (Entered: 06/09/2011)
06/09/2011	2	Corporate Disclosure Statement by Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Wallace, Michael) (Entered: 06/09/2011)

06/09/2011	3	NOTICE of Service of *Rule 7.1 Corporate Disclosure Statement* Disclosure by Hannstar Display Corporation (Gerity, Thomas) (Entered: 06/09/2011)
06/09/2011	4	Corporate Disclosure Statement by Hannstar Display Corporation (Gerity, Thomas) (Entered: 06/09/2011)
06/09/2011	5	Corporate Disclosure Statement by Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD. (Boone, Walter) (Entered: 06/09/2011)
06/09/2011	6	Corporate Disclosure Statement by Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc. (Heidelberg, Cecil) (Entered: 06/09/2011)
06/10/2011		DOCKET ANNOTATION as to # 3 . Attorney advises that there is an error in this entry, and it should be disregarded. It has been correctly refiled as Doc. 4 . (ND) (Entered: 06/10/2011)
06/10/2011	7	Corporate Disclosure Statement by LG Display America, Inc., LG Display Co. (Crawford, John) (Entered: 06/10/2011)
06/10/2011	8	Corporate Disclosure Statement by Sharp Corporation, Sharp

		Electronics Corporation (Thomas, Philip) (Entered: 06/10/2011)
06/10/2011	9	Corporate Disclosure Statement by CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc. (Thomas, Stephen) (Entered: 06/10/2011)
06/10/2011	10	NOTICE *of Filing of Notice of Potential Tag-Along Action with the United States Judicial Panel on Multidistrict Litigation* by The State of Mississippi (Attachments: # 1 Exhibit 1)(Aldridge, Meredith) (Entered: 06/10/2011)
06/13/2011	11	Letter sent to MDL Clerk with docket entries and complaint/notice of removal. (RRL) (Entered: 06/13/2011)
06/13/2011	12	Corporate Disclosure Statement by AU Optronics Corporation (Shelson, James) (Entered: 06/13/2011)
06/14/2011	13	Consent MOTION for Extension of Time to File Answer *to Plaintiffs' Complaint* by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei

		Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Wallace, Michael) (Entered: 06/14/2011)
06/15/2011	14	ORDER granting 13 Motion for Extension of Time to Answer Signed by Magistrate Judge F. Keith Ball on June 15, 2011 (WS) (Entered: 06/15/2011)
06/20/2011	15	State Court Record by Defendants AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co.,

		Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. Volumes 1 (Wallace, Michael) (Entered: 06/20/2011)
* * *	* * *	* * *
07/11/2011	17	MOTION to Stay Case by The State of Mississippi (Aldridge, Meredith) (Entered: 07/11/2011)
07/11/2011	18	MEMORANDUM in Support re 17 MOTION to Stay Case *Memorandum of Law in Support of Motion to Stay All Proceedings Pending a Decision on Transfer by the Judicial Panel on Multidistrict Litigation* filed by The State of Mississippi (Aldridge, Meredith) (Entered: 07/11/2011)
07/11/2011	19	MOTION to Remand by The State of Mississippi (Attachments: # 1 Exhibit A - Conditional Transfer Order No. 15, # 2 Exhibit B - Defendants' Notice of Opposition to Conditional Transfer Order No. 15)(Aldridge, Meredith) (Entered:

		07/11/2011)
07/11/2011	20	MEMORANDUM in Support re 19 MOTION to Remand filed by The State of Mississippi (Aldridge, Meredith) (Entered: 07/11/2011)
07/12/2011		TEXT ONLY ORDER STAYING DISCOVERY except for remand-related discovery pending a ruling by the district judge on the Motion to Remand. NO FURTHER WRITTEN ORDER SHALL ISSUE FROM THE COURT. Signed by Magistrate Judge F. Keith Ball on 7/12/11. (JEJ) (Entered: 07/12/2011)
* * *	* * *	* * *
07/25/2011	24	ORDER POSTPONING DECISION ON TRANSFER filed by MDL. (ND) (Entered: 07/25/2011)
07/25/2011	25	RESPONSE in Opposition re 19 MOTION to Remand filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display

		America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit Moving Defendants' Motion to Stay, # 2 Exhibit Opinion and Judgment on the Pleadings)(Wallace, Michael) (Entered: 07/25/2011)
07/25/2011	26	RESPONSE in Opposition re 17 MOTION to Stay Case filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components,

		Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit Moving Defendants' Motion to Stay, # 2 Exhibit Opposition to Defendants' Motion to Stay, # 3 Exhibit Order Postponing Decision on Motion to Vacate, # 4 Exhibit May 3, 2011, Order Postponing Decision on Transfer, # 5 Exhibit July 25, 2011, Order Postponing Decision to Transfer)(Wallace, Michael) (Entered: 07/25/2011)
08/04/2011	27	NOTICE *of Withdrawal of Motion to Stay All Proceedings* by The State of Mississippi re 18 Memorandum in Support of Motion, 17 MOTION to Stay Case (Aldridge, Meredith) (Entered: 08/04/2011)
08/04/2011	28	REPLY to Response to Motion re 19 MOTION to Remand, 25 Response in Opposition to Motion,,, filed by The State of Mississippi (Attachments: # 1 Exhibit A to Reply Memorandum in Support of Motion To Remand, # 2 Exhibit B to Reply Memorandum in Support of Motion to Remand)(Aldridge, Meredith) (Entered: 08/04/2011)
08/05/2011	29	AMENDED DOCUMENT by The

		State of Mississippi. Amendment to 28 Reply to Response to Motion, *re Motion to Remand* (Aldridge, Meredith) (Entered: 08/05/2011)
08/12/2011	30	MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Chunghwa Picture Tubes LTD, Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Ross, Charles) (Entered: 08/12/2011)
08/18/2011		TEXT ONLY ORDER finding as

		moot 17 Motion to Stay Case. NO FURTHER WRITTEN ORDER WILL ISSUE. Signed by Magistrate Judge F. Keith Ball on August 18, 2011. (WS) (Entered: 08/18/2011)
08/26/2011	31	RESPONSE in Opposition re 30 MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion filed by The State of Mississippi (Aldridge, Meredith) (Entered: 08/26/2011)
* * *	* * *	* * *
09/06/2011	33	RESPONSE in Support re 30 MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in

	Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion MOTION to Strike 29 Amended Document, 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Chunghwa Picture Tubes LTD, Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, The State of Mississippi, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba

		Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit Exhibit 1 Declaration of Thomas Paonessa, # 2 Exhibit Exhibit 2 - Declaration of Andrew Hrubec, # 3 Exhibit Exhibit 3 - Declaration of John H. Chung)(Ross, Charles) (Entered: 09/06/2011)
* * *	* * * * * *	
09/14/2011	34	NOTICE *of Supplemental Authority* by The State of Mississippi re 28 Reply to Response to Motion, 19 MOTION to Remand (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Anderson - PHV, Carolyn) (Entered: 09/14/2011)
09/15/2011		DOCKET ANNOTATION as to # 34 . L.U.Civ.R. 7(b)(2) requires that all supporting exhibits to a document be denominated by an exhibit letter or number and a meaningful description. Attorney is advised to follow this rule in future filings. (ND) (Entered: 09/15/2011)
10/03/2011	35	NOTICE *of Supplemental Authority* by The State of Mississippi re 28 Reply to Response to Motion, 19 MOTION to Remand (Attachments: # 1 Exhibit A)(Anderson - PHV,

		Carolyn) (Entered: 10/03/2011)
10/03/2011		DOCKET ANNOTATION as to # 35 . L.U.Civ.R. 7(b)(2) requires that all supporting exhibits to a document be denominated by an exhibit letter or number AND a meaningful description. Attorney is advised to follow this rule in future filings. (ND) (Entered: 10/03/2011)
11/29/2011	36	NOTICE *of Supplemental Authority* by The State of Mississippi re 28 Reply to Response to Motion, 19 MOTION to Remand, 20 Memorandum in Support of Motion (Attachments: # 1 Exhibit A - CVS Pharmacy, Inc. et al. v. West Virginia, ex rel. McGraw, ____ S.Ct. ____, 2011 WL 3794281 (2011))(Anderson PHV, Carolyn) (Entered: 11/29/2011)
12/07/2011	37	Joint MOTION for Protective Order *and to Lift, in Part, Discovery Stay* by Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., The State of Mississippi (Attachments: # 1 Exhibit A - Protective Order)(Anderson PHV, Carolyn) (Entered: 12/07/2011)
12/27/2011	38	RESPONSE in Opposition re 37

		Joint MOTION for Protective Order *and to Lift, in Part, Discovery Stay and Enter Protective Order* filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Ross, Charles) (Entered: 12/27/2011)
12/27/2011	39	AFFIDAVIT in Opposition re 37 Joint MOTION for Protective Order *and to Lift, in Part, Discovery Stay and Enter Protective Order* filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation,

	Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit A-Plaintiff State of MS First Set of Interrogatories & Requests for Production of Documents to Samsung, # 2 Exhibit B-proposed Order Partially Lifting Discovery Stay, # 3 Exhibit C-Stipulated Protective Order in MDL 1827, # 4 Exhibit D-Stipulation of Extenion of Time to Respond to Complaint & Waiver of Service, # 5 Exhibit E-Letter Dated 7-7-2011 to Hester from Anderson, # 6 Exhibit F-State of Washington's Opposition to Defendants' Motion for Entry of Protective Order, # 7 Exhibit G-Order in Martin v Food Giant Supermarkets, # 8 Exhibit H-Order in U.S. Automobile Assoc v. State Farm)(Ross, Charles) (Entered: 12/27/2011)
12/28/2011	DOCKET ANNOTATION as to 38 : Certificate of Service is unsigned. The accompanying

		document has been properly signed. The electronic file stamp will be construed as the signature for the Certificate. Pursuant to Fed.R.Civ.P. Rule 5.(d)(3) the Certificate of Service must be signed. Attorney is directed to follow this rule in future filings. (PKM) (Entered: 12/28/2011)
12/28/2011		DOCKET ANNOTATION as to 39 : This document is not accompanied by a certificate of service. A certificate of service must be attached to a document [Administrative Procedures for Electronic Case Filing, Sec. 4.A.1, Sec. 4.B, and Fed.R.Civ.P. Rule 5(d)(1)]. Attorney is directed to file a certificate as CERTIFICATE OF SERVICE and link it to the proper document. (PKM) (Entered: 12/28/2011)
12/28/2011	40	CERTIFICATE OF SERVICE by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co.,

		Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. re 39 Affidavit in Opposition to Motion,,,,, (Ross, Charles) (Entered: 12/28/2011)
01/06/2012	41	Rebuttal re 38 Response in Opposition to Motion,, 37 Joint MOTION for Protective Order *and to Lift, in Part, Discovery Stay* filed by The State of Mississippi (Anderson - PHV, Carolyn) (Entered: 01/06/2012)
01/06/2012	42	AFFIDAVIT in Support re 37 Joint MOTION for Protective Order *and to Lift, in Part, Discovery Stay (Rebuttal)* filed by The State of Mississippi (Anderson - PHV, Carolyn) (Entered: 01/06/2012)
01/13/2012	43	ORDER denying 37 Motion for Protective Order. Signed by Magistrate Judge F. Keith Ball on January 13, 2012. (WS) (Entered: 01/13/2012)
05/02/2012	44	NOTICE *of Name Change* by Hitachi Displays, LTD. (Boone, Walter) (Entered: 05/02/2012)
05/02/2012	45	Corporate Disclosure Statement by

		Hitachi Displays, LTD. (Boone, Walter) (Entered: 05/02/2012)
05/03/2012	46	ORDER granting 19 Motion to Remand; granting 30 Motion to Strike. This cause is remanded to the Chancery Court of Hinds County, Mississippi. Signed by District Judge Carlton W. Reeves on 5/3/2012. (AC) (Entered: 05/03/2012)
05/14/2012	47	MOTION to Stay Proceedings *Remand Order* by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit Petition for Permission

		to Appeal Order Granting Remand Pursuant to 28 U.S.C. section 1453(c), # 2 Exhibit Order Staying Remand Order Pending Appeal in State of South Carolina v. AU Optronics Corp. and AU Optronics Corporation America)(Ross, Charles) (Entered: 05/14/2012)
05/15/2012	48	NOTICE *Name Change and Corporate Disclosure Statement* by Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc. (Thomas, Stephen) (Entered: 05/15/2012)
05/15/2012		Set/Reset Hearings: Telephonic Status Conference set for 5/15/2012 at 3:00 PM before District Judge Carlton W. Reeves, regarding the Toshiba defendants' 5/14/2012 letter to the Court and 47 Motion to Stay. The dial-in number is 601-608-3977. (AC) (Entered: 05/15/2012)
05/15/2012		Minute Entry for proceedings held before District Judge Carlton W. Reeves: Telephone Status Conference held on 5/15/2012. (JS) (Entered: 05/16/2012)
05/17/2012	49	Supplemental MOTION to Stay Proceedings *Order of Remand* by AU Optronics Corporation, AU Optronics Corporation America,

		Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Ross, Charles) (Entered: 05/17/2012)
05/17/2012		DOCKET ANNOTATION as to # 49 . Incorrect event chosen. This document should have been docketed as MEMORANDUM in Support of Motion and not a Motion. Attorney is directed to refile using the correct event. Motion 49 will be terminated. (ND) (Entered: 05/17/2012)
05/17/2012	50	MEMORANDUM IN SUPPORT re 47 MOTION to Stay Proceedings *Remand Order* filed by AU Optronics Corporation, AU Optronics Corporation America,

		Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Ross, Charles) (Entered: 05/17/2012)
05/31/2012	51	RESPONSE to Memorandum re 50 Memorandum in Support,, *Submission Regarding the Court's Jurisdiction to Consider Defendants' Motion to Stay Remand Order* filed by The State of Mississippi (Anderson - PHV, Carolyn) (Entered: 05/31/2012)
06/07/2012	52	REPLY to Response to Motion re 47 MOTION to Stay Proceedings *Remand Order* filed by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi

		Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Ross, Charles) (Entered: 06/07/2012)
06/11/2012	53	Joint MOTION for Extension of Time to File Answer *For Entry of Stipulated Order For Entry of Extension of Time to Answer and Respond to Discovery* by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Displays, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co.,

		Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, The State of Mississippi, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit 1 - Stipulated Order For entry of Order Extending Time to Answer and Respond to Discovery)(Ross, Charles) (Entered: 06/11/2012)
06/13/2012	54	ORDER granting 53 Joint Motion for Entry of Stipulated Order. Signed by District Judge Carlton W. Reeves on 6/11/2012. (Attachments: # 1 Confidentiality Agreement, # 2 Protective Order) (AC) (Entered: 06/13/2012)
06/13/2012		TEXT-ONLY ORDER finding as moot 47 Motion to Stay Proceedings in light of Charles Ross's 6/11/2012 letter to the Court and 54 Stipulated Order. NO FURTHER WRITTEN ORDER SHALL ISSUE. Signed by District Judge Carlton W. Reeves on 6/13/2012. (AC) (Entered: 06/13/2012)
09/14/2012		Appeal Filing Fee received: $

		455.00, receipt number 34643017795. (ND) (Entered: 09/14/2012)
09/17/2012	55	CERTIFIED COPY OF USCA ORDER (Attachments: # 1 Cover Letter)(ND) (Entered: 09/18/2012)
09/19/2012	56	TRANSCRIPT REQUEST filed by Defendants. (ND) (Entered: 09/19/2012)
11/28/2012	57	Copy of USCA OPINION (Attachments: # 1 Cover Letter)(ND) (Entered: 11/28/2012)
11/28/2012	58	CERTIFIED COPY OF THE USCA JUDGMENT remanding to the District Court for further proceedings in accordance with the opinion of this Court. (Attachments: # 1 Cover Letter)(ND) (Entered: 11/28/2012)
* * *	* * *	* * *
01/15/2013	61	NOTICE of Filing USCA Approved Bill of Costs. (Attachments: # 1 Cover Letter)(ND) (Entered: 01/15/2013)
* * *	* * *	* * *
02/08/2013	62	Copy of USCA ORDER (Attachments: # 1 Cover Letter)(ND) (Entered: 02/08/2013)
02/08/2013	63	Copy of USCA ORDER (Attachments: # 1 Cover

		Letter)(ND) (Entered: 02/08/2013)
02/13/2013	64	Rule 16(a) Initial Order Telephonic Case Management Conference set for 4/11/2013 01:45 PM before Magistrate Judge F. Keith Ball. No later than seven (7) days prior to the TCMC, a confidential memorandum AND a proposed Case Management Order shall be submitted via e-mail to ball_chambers@mssd.uscourts.gov . (JEJ) (Entered: 02/13/2013)
* * *	* * *	* * *
02/28/2013	66	MOTION to Withdraw as Attorney by AU Optronics Corporation (Munford, Luther) (Entered: 02/28/2013)
03/05/2013	67	MOTION to Withdraw as Attorney by AU Optronics Corporation America, Inc. (Munford, Luther) (Entered: 03/05/2013)
03/06/2013		TEXT ORDER granting 66 Motion to Withdraw as Attorney. Attorney Luther T. Munford terminated. NO FURTHER WRITTEN ORDER WILL ISSUE FROM THE COURT. Signed by Magistrate Judge F. Keith Ball on 3/6/13. (WS) (Entered: 03/06/2013)
03/06/2013		TEXT ONLY ORDER granting 67

		Motion to Withdraw as Attorney. NO FURTHER WRITTEN ORDER WILL ISSUE FROM THE COURT. Signed by Magistrate Judge F. Keith Ball on 3/6/13. (WS) (Entered: 03/06/2013)
03/20/2013	68	MOTION to Stay Proceedings *Postpone Case Management Conference* by AU Optronics Corporation, AU Optronics Corporation America, Inc., CMO Japan Co., LTD, Chi Me Optoelectronics Corporation, Chi Mei Corporation, Chi Mei Optoelectronics USA, Inc., Hannstar Display Corporation, Hitachi Display, LTD., Hitachi Electronic Devices (USA), Inc., Hitachi, LTD., LG Display America, Inc., LG Display Co., Samsung Electronics America, Inc., Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Sharp Corporation, Sharp Electronics Corporation, Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, Toshiba Mobile Display Co., LTD. (Attachments: # 1 Exhibit Petition for Writ of Certiorari Cover Page, # 2 Exhibit Stipulated Order for Entry of Order Extending Time to Answer

		and Respond to Discovery, # 3 Exhibit Email from Patricia Bloodgood to Charles E. Ross)(Ross, Charles) (Entered: 03/20/2013)
03/21/2013	69	MOTION to Withdraw as Attorney by The State of Mississippi (Aldridge, Meredith) (Entered: 03/21/2013)
03/21/2013		TEXT ONLY ORDER granting 69 Motion to Withdraw as Attorney. Attorney Meredith McCollum Aldridge terminated. NO FURTHER WRITTEN ORDER WILL ISSUE FROM THE COURT. Signed by Magistrate Judge F. Keith Ball on 3/21/13. (WS) (Entered: 03/21/2013)
03/21/2013	70	NOTICE *of Voluntary Dismissal With Prejudice of the Hitachi Defendants* by The State of Mississippi (Anderson PHV, Carolyn) (Entered: 03/21/2013)
03/22/2013	71	ORDER granting 68 Motion to Stay Proceedings. Signed by Magistrate Judge F. Keith Ball on 3/22/13. (WS) (Entered: 03/22/2013)
03/25/2013		TEXT ONLY ORDER STAYING CASE until further order of the Court pursuant to Judge Reeves's Order (Docket No. 54) and the

		final resolution of the Petition for Writ of Certiorari and/or appeal to the United States Supreme Court. NO FURTHER WRITTEN ORDER WILL ISSUE. Signed by Magistrate Judge F. Keith Ball on 3/25/13. (YWJ) (Entered: 03/25/2013)
06/07/2013	72	SUPREME COURT ORDER Petition for a Writ of Certiorari is Granted. (Attachments: # 1 Cover Letter)(ND) (Entered: 06/07/2013)

RELEVANT DOCKET ENTRIES

Mississippi Chancery Court

HINDS COUNTY, MISSISSIPPI
CHANCERY COURT DOCKET INFORMATION
FOR CASE G-2011-516

FILED: 3-25-11 CASE TYPE: MISC JUDGE: THOMAS

THE STATE OF MISSISSIPPI
JIM HOOD ATTORNEY GENERAL
VS.
AU OPTRONICS CORP
AU OPTRONICS CORP AMERICA INC
CHI MEI CORP
CHI ME POTOETRONIC CORP [sic]
CHI MEI OPTELECTRONIC USA INC

03/28/11	PAYMENT	CHECK #54630 ZIMMERMAN REED
03/25/11	PETITION	PRELIMINARY STATEMENT
03/31/11	FILE CHECKED OUT	BUTLER SNOW 601-985-5711
04/04/11	FILE CHECKED IN	
04/08/11	APPLICATION	VERIFIED APPLICATION FOR ADMITTANCE PRO HAC VICE
04/26/11	MISC	APPLICATION

		FOR ADMITTANCE PRO HAC VICE DAVID CIALKOWSKI
04/26/11	MISC	APPLICATION FOR ADMITTANCE PRO HAC VICE PATRICIA BLOODGOOD
05/04/11	FILE CHECKED OUT	CHARLIE ROSS 601-968-5500
05/04/11	FILE CHECKED IN	
05/10/11	MISC	STIPULATION OF EXTENSION OF TIME TO RESPOND TO COMPLAIN AND WAIVER OF SERVICE AND
05/16/11	CERTIFICATE	REVISED CERTIFICATE OF SERVICE RELATING TO SERVICE OF VERIFIED APPLICATION
05/25/11	ORDER	ALLOWING APPEARANCE OF DAVID

		CIALKOWSKI PRO HAC VICE
05/25/11	ORDER	ALLOWING APPEARANCE OF PATRICIA BLOODGOOD PRO HAC VICE
05/25/11	ORDER	ALLOWING APPEARANCE OF CAROLYN ANDERSON PRO HAC VICE
05/26/11	FILE CHECKED OUT	JOHN BUFORD 601-968-5500
05/26/11	FILE CHECKED IN	
06/09/11	NOTICE	OF FILING OF NOTICE OF REMOVAL
06/09/11	MISC	CASE CLOSED FOR REMOVAL PURPOSES ONLY
07/18/11	SUMMONS ISSUED	CHUNGWA PICTURE TUBES, LTD; CLK TO ATTY FOR SRVC (ISSUED AT ATTY'S RQST)
05/08/12	MISC	ORDER FROM

		US DISTRICT CT OF MS
06/11/12	MOTION	AGREED JOINT MOTION FOR ENTRY OF STIPULATED ORDER FOR ENTRY OF EXTENSION OF TIME
06/12/12	ORDER	STIPULATED ORDER FOR ENTRY OF EXTENSION OF TIME TO ANSWER & RESPOND TO DISC

Text of Class Action Fairness Act of 2005

Public Law 109-2
109th Congress

An Act

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

<< 28 USCA § 1 NOTE >>

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2005".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.
Sec. 4. Federal district court jurisdiction for interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.
Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.
Sec. 9. Effective date.
<< 28 USCA § 1711 NOTE >>

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:
(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
(2) Over the past decade, there have been abuses of the class action device that have—
(A) harmed class members with legitimate claims and defendants that have acted responsibly;
(B) adversely affected interstate commerce; and
(C) undermined public respect for our judicial system.
(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—
(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended

by the framers of the United States Constitution, in that State and local courts are—
(A) keeping cases of national importance out of Federal court;
(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.
(b) PURPOSES.—The purposes of this Act are to—
(1) assure fair and prompt recoveries for class members with legitimate claims;
(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

<< 28 USCA prec. § 1711 >>
(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.
"1711. Definitions.
"1712. Coupon settlements.
"1713. Protection against loss by class members.
"1714. Protection against discrimination based on geographic location.
"1715. Notifications to appropriate Federal and State officials.

<< 28 USCA § 1711 >>

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.—The term 'class' means all of the class members in a class action.
"(2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.
"(3) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.
"(4) CLASS MEMBERS.—The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.
"(5) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.
"(6) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.
<< 28 USCA § 1712 >>
"§ 1712. Coupon settlements
"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.
"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

"(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

"(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

<< 28 USCA § 1713 >>

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

<< 28 USCA § 1714 >>

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

<< 28 USCA § 1715 >>

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—
"(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term 'appropriate Federal official' means—
"(A) the Attorney General of the United States; or
"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.
"(2) APPROPRIATE STATE OFFICIAL.—In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.
"(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);
"(2) notice of any scheduled judicial hearing in the class action;
"(3) any proposed or final notification to class members of—
"(A)(i) the members' rights to request exclusion from the class action; or
"(ii) if no right to request exclusion exists, a statement that no such right exists; and
"(B) a proposed settlement of a class action;
"(4) any proposed or final class action settlement;
"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;
"(6) any final judgment or notice of dismissal;
"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or
"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and
"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.
"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.
"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.
"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".
<< 28 USCA prec. § 1651 >>
(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:
"114. Class Action.1711".
SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.
(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—
<< 28 USCA § 1332 >>

(1) by redesignating subsection (d) as subsection (e); and

<< 28 USCA § 1332 >>

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third

but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

"(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to

Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

"(B)(i)As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action

within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply—

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS.—

<< 28 USCA § 1335 >>

(1) Section 1335(a)(1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

<< 28 USCA § 1603 >>

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

<< 28 USCA § 1453 >>

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.—

"(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class

action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60–day period described in paragraph (2) if—

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating

to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).".

<< 28 USCA prec. § 1441 >>

(b) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions."

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

<< 28 USCA § 2074 NOTE >>

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

<< 28 USCA § 2071 NOTE >>

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

<< 28 USCA § 1332 NOTE >>

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

Text of 28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States,

where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was

originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are

citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section

1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported

class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section,

includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Text of 28 U.S.C. § 1446

§ 1446. Procedure for removal of civil actions

(a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) Requirements; generally.—**(1)** The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) Requirements; removal based on diversity of citizenship.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the

sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year

after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) Notice to adverse parties and State court.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) Counterclaim in 337 proceeding.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

[**(f)** Redesignated (e)]

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a

proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

Text of 28 U.S.C. § 1453

§ 1453. Removal of class actions

(a) Definitions.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.—If the court of

appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C.

78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

Text of 28 U.S.C. § 1711

§ 1711. Definitions
Effective: February 18, 2005

In this chapter:

(1) Class.—The term "class" means all of the class members in a class action.

(2) Class action.—The term "class action" means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

(3) Class counsel.—The term "class counsel" means the persons who serve as the attorneys for the class members in a proposed or certified class action.

(4) Class members.—The term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(5) Plaintiff class action.—The term "plaintiff class action" means a class action in which class members are plaintiffs.

(6) Proposed settlement.—The term "proposed settlement" means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

PETITIONER'S BRIEF

No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Respondents include AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated; and Chunghwa Picture Tubes Ltd. The following parties were Defendants below but since have been voluntarily dismissed in the District Court: Hitachi, Limited; Japan Display East, Incorporated; and Hitachi Electronic Devices (USA), Incorporated.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a–22a) is reported at 701 F.3d 796. The decision of the U.S. District Court for the Southern District of Mississippi (Pet. App. 23a-60a) is reported at 876 F. Supp. 2d 758.

JURISDICTION

The Fifth Circuit issued its decision on November 21, 2012 (Pet. App. 1a) and its Judgment and Mandate on the same date. *Id.* at 62a. The Fifth Circuit also issued an order denying rehearing on February 4, 2013. *Id.* at 63a-65a. The Petition for Writ of Certiorari was filed on February 19, 2013, and granted on May 28, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, is reproduced in full in the Joint Appendix, J.A. 52a-70a, with statutory provisions at J.A. 71a-91a. As most relevant here, CAFA provides:

> **(11)**
>
> **(B)**
>
> **(i)** As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact,

except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

. . .

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

28 U.S.C. §1332.

Relevant provisions of the Mississippi Antitrust Act, Miss. Code § 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, *id.* at § 75-24-1 *et seq.*, are set forth at Pet. App. 66a-76a.

STATEMENT OF THE CASE

The question presented is whether the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, should be interpreted as eliminating the authority of a state attorney general, acting as the chief legal officer of a State, to bring a *parens patriae* action in state court, even when the State is the only plaintiff, the claims arise solely under state law, and the state attorney general has statutory and common-law authority to assert the claims.

The Fifth Circuit incorrectly held that CAFA makes state attorney general actions removable to federal court as so-called "mass actions" and thereby effects an extraordinary invasion into state sovereign prerogatives. Every other Court of Appeals to have considered the question has properly rejected the Fifth Circuit's interpretation of CAFA.

CAFA's text and structure make clear that state *parens patriae* suits are not "mass actions" under CAFA. If there were any doubt, principles of federalism would compel that removal statutes be narrowly construed. The tradition of *parens patriae* actions and the longstanding "real party in interest" test also confirm that the State is properly the sole plaintiff in an attorney general suit.

A. The CAFA Statute.

CAFA creates original jurisdiction in the federal districts pursuant to the diversity jurisdiction statute over "class actions" and "mass actions."

CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil

Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action" that seeks over $5,000,000 in aggregate damages. 28 U.S.C. § 1332(d)(1)(B), (d)(2)(A). *See generally Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

CAFA defines a "mass action" as a civil action in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i).

B. Background of this Case.

Respondents manufactured, marketed, sold, or distributed liquid crystal display ("LCD") panels, which are components of computers, televisions, mobile phones, and a wide variety of other commonly used electronic devices. Pet. App. 24a. Petitioner alleges that Respondents conspired between 1996 and 2006 artificially to limit the supply and increase the price of LCD panels, thereby increasing the price of every product containing such a panel during that time period. *Id.* at 24a-25a. Several Respondents and their co-conspirators pled guilty to criminal charges brought by the United States Department of Justice for this conduct and paid criminal fines to the United States government. *Id.* at 25a. None of those fines compensated Mississippi. *Id.*

On March 25, 2011, Mississippi commenced this action in state court, in the name of the State, pursuant to the Mississippi Antitrust Act ("MAA"),

Miss. Code § 75-21-1, *et seq.*, and the Mississippi Consumer Protection Act ("MCPA"), *id.* at § 75-24-1, *et seq.* The Complaint asserts two claims by the State (one under the MAA, one under the MCPA), stemming from the Attorney General's independent authority and the State's sovereign and quasi-sovereign interests. *E.g.*, Resp. App. 3a ("the State of Mississippi has a quasi-sovereign interest in the direct and indirect effect of defendants' illegal conspiracy on the state's economy and the citizens' economic condition").

The statutory provisions on which the State relies for its claims are different from the provisions on which a private individual or consumer would rely for a damages claim. For example, the MAA provides direct statutory authority for the Attorney General to pursue both monetary and injunctive relief ("suits at law or in equity") in the name of the State "to enforce the civil features of the antitrust laws." Miss. Code. § 75-21-37. Although the MAA creates a private right to enforce the antitrust laws and to seek personal recovery of damages and a $500 penalty, *id.* at § 75-21-9, the Attorney General's Complaint does not seek relief pursuant to that section of the statute.

Similarly, the MCPA provides direct statutory authority for the Attorney General to bring an action for injunctive relief where "proceedings would be in the public interest," *id.* at § 75-24-9, and for a court to issue "additional orders or judgments, including restitution." *Id.* at § 75-24-11. Like the MAA, the MCPA creates a separate, auxiliary private right to recover personal monetary losses where certain prerequisites are met. *Id.* at § 75-24-15. Again, the

Complaint does not assert a claim under Section 75-24-15.

The Complaint prays that "the Plaintiff, the State of Mississippi, be granted the following specific relief" (Resp. App. 65a), including:

- a permanent injunction pursuant to the MAA and MCPA prohibiting the Defendants from continuing to engage in anti-competitive behavior, *id.*;

- civil penalties of up to $10,000 per violation under the MCPA and of up to $2,000 per month, per Defendant under the MAA, to be awarded to "the State of Mississippi," and also, in accordance with the MCPA, "that defendants be ordered to restitute any and all monies to the State of Mississippi" for purchases of LCD products by the State and its citizens, *id.*; and

- "[t]hat Plaintiff, bringing this action on behalf of the State of Mississippi in its proprietary capacity on its own behalf, and on behalf of Mississippi residents, including local governmental entities," *id.*, be awarded "restitution and its damages in an amount according to proof," punitive damages under Mississippi law, and other relief, including pre- and post-judgment interest and attorney's fees and costs. *Id.* at 66a.

Mississippi's lawsuit is one of thirteen *parens patriae* lawsuits against most of the same defendants brought by the Attorneys General of Arkansas, California, Florida, Illinois, Michigan,

Missouri, New York, Oregon, South Carolina, Washington, West Virginia, and Wisconsin.[1]

Some of these cases alleged both state and federal claims and were commenced in federal court.[2] A consolidated multi-district litigation ("MDL") is pending in the Northern District of California and includes attorney general actions filed in federal court, as well as various private indirect purchaser class actions, including a Mississippi indirect purchaser class. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal. filed Apr. 20, 2007).

The indirect purchaser class action in the MDL, which includes Mississippi consumers, has settled. The MDL Court's preliminary approval order noted the statement of the settling defendants that the settlement would not foreclose *parens patriae* claims asserted by non-settling state attorneys general:

> At the hearing on the Proposed Settlements, all of the Settling Defendants agreed that

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[1] *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Rosenblum v. AU Optronics Corp.*, No. 3:07-md-1827 (N.D. Cal); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics Corp.*, No. 10 CH 34472 (Cir. Ct. of Cook County); *Washington v. AU Optronics Corp.*, No. 10-2-29164-4 (King County Dist. Ct.).

[2] *See* Compl. for Damages, Civil Penalties, Injunctive and Other Relief (Dkt. 1), *Missouri ex rel. Koster v. AU Optronics Corp.*, No. 3:10-cv-03619 (N.D. Cal. filed Aug. 17, 2010).

> the Proposed Settlements *were not intended to have any effect* on the above [state claims, including *parens patriae*] claims, and indicated that they would not seek dismissal of those claims based upon the Proposed Settlements.[3]

Five of the thirteen state attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in their state courts asserting only state-law claims. Defendants removed each of these actions to federal court, asserting CAFA jurisdiction. In all five cases, the district court remanded the case to state court, finding CAFA jurisdiction lacking. *See* Pet. App. 15a n.3. In each case, except this one, the relevant court of appeals upheld the district court's remand order and opined that removal under CAFA was improper. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), petition for cert. pending, No. 12-911; *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).

C. The District Court's Decision.

On June 9, 2011, Respondents removed this case to the federal District Court, contending that the

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[3] *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, at 2 (N.D. Cal. Jan. 26, 2012) (Dkt. 4688) (emphasis added); *see also In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, 2013 WL 1365900, *6 (N.D.Cal. Apr. 3, 2013) (Second Amended Order Granting Final Approval) (noting "the assurances Defendants made at the November 29, 2012, hearing that monetary claims, including *parens patriae* claims, of the non-Settling States who were not part of a defined damages class would not be released").

case was both a "class action" and a "mass action" under CAFA. Pet. App. 26a. The State moved to remand the case to state court and the District Court granted the motion. The District Court held this action was not a "class action" within the meaning of CAFA. *Id.* at 40a-44a. The District Court explained that it was constrained to follow the Fifth Circuit precedent in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), and to hold that the Attorney General's case was a "mass action," despite the District Court's view that the mass action provision addresses "mass joinder" situations involving a large group of named plaintiffs. Pet. App. 45a n.9. However, the District Court held that (even under Fifth Circuit precedent) the action was exempt from CAFA removal under the "general public" exception. *Id.* at 46a-52a.

D. The Court of Appeals' Decision.

The Fifth Circuit reversed the District Court's remand order. The Court of Appeals concluded the Attorney General's suit was not a "class action" under CAFA, *id.* at 2a-3a, but that it qualified as a "mass action" under *Caldwell*. The Fifth Circuit held that its *Caldwell* precedent required the court to "pierce the pleadings and look at the real nature of a state's claims," on a "claim-by-claim approach." *Id.* at 4a. The Court of Appeals opined that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a. The Fifth Circuit determined that the "general public" exception of CAFA did not apply and indeed was "statutory surplusage" (*id.* at 10a n.1) under its interpretation of CAFA.

One member of the panel, Judge Elrod, concurred in the judgment but wrote separately to express agreement with the vigorous dissent in *Caldwell* by Judge Southwick. *Id.* at 15a-16a. Judge Elrod explained that "the claim-by-claim approach does not find a foothold in CAFA's text" and that nothing in the statutory language "suggest[s] that, in a case in which a single plaintiff brings suit, a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief." *Id.* at 17a. "Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be 'strictly construed.'" *Id.* at 18a (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). Further, Judge Elrod observed that "applying *Caldwell's* reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law." *Id.* at 12a.

SUMMARY OF ARGUMENT

Ultimately, this is a case about federalism and respect for the institutional sovereignty of the States and their chief legal officers, legislatures, and judicial systems. Mississippi, acting through its Attorney General, filed this action in its own courts to enforce state antitrust and consumer protection statutes applicable only in Mississippi. Whatever "abuses" may have been CAFA's targets, they did not include *parens patriae* actions to vindicate the States' sovereign and quasi-sovereign interests, filed by their politically accountable chief legal officers. Such actions serve critical state needs, and there are

important and legitimate reasons for a state attorney general to choose to file them in state court.

I. The text, structure, and history of CAFA demonstrate that it does not extend to *parens patriae* actions. The CAFA "mass action" provision refers to a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

Parens patriae actions fall outside this definition. They do not propose a "joint[]" trial of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." The only *claims* or causes of action asserted are the claims of the State, which is the sole plaintiff. The CAFA mass action provision is aimed at the quite different situation where multiple named plaintiffs, each with his or her own claims, are joined in a single suit.

CAFA also provides that a "mass action" cannot be created by a defendant's joinder motion. In urging that the absent Mississippi consumers be treated as if they had been consolidated for purposes of removal, Respondents are attempting to achieve indirectly what CAFA bars them from doing directly.

The Court of Appeals' interpretation would lead to severe practical problems, further demonstrating that it cannot be a proper construction of the statute. For example, CAFA mandates that a federal court remand to state court "those plaintiffs" in a mass action whose "claims" do not satisfy the $75,000 jurisdictional amount in controversy requirement of federal diversity jurisdiction. In an action brought

by an attorney general, it would be wholly impractical for a court to ensure that each consumer in a State meets the federal amount-in-controversy threshold and to remand to state court particular consumers whose claims do not meet the federal diversity amount-in-controversy requirement.

Similarly, CAFA bars transfer of a mass action to another court "unless a majority of the plaintiffs in the action" request transfer. There is no mechanism for the hundreds of thousands (or millions) of absent consumers cited by the Court of Appeals to request or consent to transfer of the action.

In addition, CAFA contains a "general public" exception to mass action jurisdiction, which the Court of Appeals' interpretation would render a nullity.

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes are narrowly construed. That principle has special force in this context because the Petitioner Attorney General is the chief legal officer of a sovereign State. CAFA should not be construed as interfering with the State's authority to pursue actions in its own courts under its own laws, because doing so would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a state-law matter into a federal case.

Legislative history confirms that CAFA does not encompass state *parens patriae* actions. CAFA's sponsors expressly reassured the States that CAFA would not cover attorney general actions.

II. The nature of *parens patriae* actions and the "real party in interest" test both demonstrate that an attorney general suit is not a mass action under CAFA. A *parens patriae* suit is a unique action by a State to advance its sovereign or quasi-sovereign interests. In such a suit, a State is properly the only plaintiff. Longstanding precedent establishes that, when a State sues in a *parens patriae* capacity, there is no need to certify a class or join additional parties (indeed, Mississippi law does not even permit class actions). Treating a *parens patriae* action as one "on behalf of" individual plaintiffs violates the fundamental principle behind attorney general actions and is inconsistent with this Court's decisions regarding the "real party in interest" test.

The Fifth Circuit's "claim-by-claim" approach improperly expands the power of a federal court to add parties to a lawsuit. Even if private citizens in Mississippi should be regarded as the real parties in interest (and they should not be), that would raise only a defective pleading issue to be addressed in state court. It would not support CAFA removal.

III. Even if this Court were to adopt a "claim-by-claim" approach, it should still reverse the judgment below, because in a *parens patriae* case the State would qualify as the real party in interest under the Fifth Circuit's test. In addition, this Court should find that CAFA's "general public" exception confirms that the statute does not extend to *parens patriae* actions, even under a "claim-by-claim" approach.

ARGUMENT

I. AN ATTORNEY GENERAL SUIT IS NOT A "MASS ACTION" UNDER CAFA.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). CAFA does not change the rule that the party seeking federal jurisdiction bears the burden of persuasion on that issue. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). Respondents cannot meet their burden.

A. There Is No CAFA Jurisdiction On The Face Of The Complaint.

This Court has instructed that the "status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal." *Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 390 (1998) (quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938)).

On its face, the Complaint in this case does not give rise to federal jurisdiction. CAFA's "mass action" provision applies only when the monetary relief claims of 100 or more persons are proposed to be tried jointly. 28 U.S.C. § 1332(d)(11)(B)(i). In this case, there is one (and only one) plaintiff: the State, acting through its Attorney General. Accordingly, the 100-person numerosity requirement of CAFA cannot be satisfied, because this case does not

consist of an action brought to press the claims of any specific consumer or citizen of Mississippi, much less to try jointly the 100 or more individual claims that define a "mass action."

Further, CAFA requires at least minimal diversity – i.e., that at least one plaintiff be diverse from one defendant. 28 U.S.C. § 1332(d)(2)(A). Even this minimal diversity requirement cannot be met in this case, because the sole plaintiff (the State of Mississippi) is not a "citizen" for purposes of diversity jurisdiction. *See Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction.").

Accordingly, the jurisdictional analysis in this case is straightforward: there is only one plaintiff in this case, and it does not qualify as a "citizen" for diversity jurisdiction. Hence, there is no federal jurisdiction under CAFA.

B. The Text of CAFA Provides That An Attorney General Suit Is Not A "Mass Action."

The Court of Appeals incorrectly transformed the straightforward jurisdictional issue into a much more complicated, and legally improper, inquiry. The Fifth Circuit followed its "claim-by-claim" approach (created out of whole cloth in its earlier *Caldwell* decision) to re-imagine the State's action as though it included Mississippi consumers who had purchased an LCD-containing product. That holding misinterpreted the CAFA statute and is inconsistent

with the decisions of every other circuit to consider the question.[4]

1. The First Clause of the "Mass Action" Definition.

The first clause of CAFA's "mass action" definition refers to a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The second clause provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.*

The text of CAFA's "mass action" definition thereby excludes *parens patriae* suits. Such actions do not propose a "joint[]" trial of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." Rather, a *parens patriae* suit involves one plaintiff, the State. The "mass action" definition is aimed at the quite different situation where multiple named plaintiffs are joined in a single suit. The language of the statute rules out the Court of Appeals' approach, for numerous reasons.

(a) The first clause of § 1332(d)(11)(B)(i) refers to the "*plaintiffs'* claims" (emphasis added) in

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[4] *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392-94 (4th Cir. 2012), petition for cert. pending, No. 12-911 (filed Jan. 23, 2013); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 218-220 (2d Cir. 2013); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); *Nevada v. Bank of America Corp.*, 672 F.3d 661, 670 (9th Cir. 2011).

specifying the claims of the "100 or more persons" at issue. Thus, although the first clause refers to "persons," the same clause equates "persons" with "plaintiffs." The second clause of § 1332(d)(11)(B)(i) then refers to them as "those plaintiffs" in providing that "jurisdiction shall exist only over those *plaintiffs* whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.* (emphasis added).

Hence, CAFA makes federal jurisdiction turn on the claims of actual *plaintiffs* – i.e., formal parties to the suit – rather than non-plaintiffs or nonparties. *See* BLACK'S LAW DICTIONARY 1267 (9th ed. 2009) (defining "plaintiff" as "[t]he party who brings a civil suit in a court of law"); *see also* GARNER'S DICTIONARY OF LEGAL USAGE 681 (3d ed. 2011) ("the party who brings suit in a court of law"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("The party that institutes a suit in a court.").

Even if the Court of Appeals were correct in imagining that Mississippi consumers were real parties in interest in this case (and the Court of Appeals was not correct, for reasons discussed in Part II, *infra*), those consumers are plainly not "*plaintiffs*" in this action. They were never named as plaintiffs or joined as parties, and Respondents never proposed to do so. Accordingly, the text of CAFA makes them irrelevant to the jurisdictional inquiry.

(b) The first clause of § 1332(d)(11)(B)(i) also refers (twice) to the "*claims*" of the plaintiffs, and the second clause of § 1332(d)(11)(B)(i) again refers to "*claims*" in providing that jurisdiction extends only

to plaintiffs whose "*claims*" in a mass action satisfy the $75,000 amount-in-controversy requirements. The term "claim" is used throughout § 1332(d)(11)(B), and in a special tolling provision, § 1332(d)(11)(D).

CAFA's repeated use of the term "claim" rules out the Fifth Circuit's approach. A "claim" entails "a right enforceable by a court" or "[a] demand for money, property, or a legal remedy to which one asserts a right." BLACK'S LAW DICTIONARY 281-82 (9th ed. 2009); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("A demand for something as rightful or due."). As this Court has observed, the term "claim" is typically used "synonymously with 'cause of action.'" *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993); *see also United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728 (2011). This understanding of a "claim" as involving a formal demand and legal entitlement to relief is consistent with Federal Rule 23 itself, which speaks to the "claims or defenses of the class" and "the desirability . . . of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(a)(3), (b)(3)(C).

The only *claims* or causes of action asserted in the instant case are the claims of the State under specific provisions of the MAA and MCPA. Regardless of whether Mississippi consumers have any interests that might be indirectly implicated by the State's lawsuit (*but see* Part II, *infra*), this case does not involve any *claims* asserted by the State's citizens. The *claims* of Mississippi residents were the subject of another action – the indirect purchaser action in the Northern District of California. When the indirect purchaser action settled, several of the

settling defendants assured the district court in California that the settlement did not release the State's *parens patriae* claims. *See* pp. 7-8, *supra*. The only *claims* at issue here are the State's claims under the MAA and MCPA.

(c) The first clause of § 1332(d)(11)(B)(i) refers to a "mass action" as a proceeding in which the claims in question are "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332 (d)(11)(B)(ii). Hence, to constitute a mass action, a civil action must propose a "joint[]" trial of the "monetary relief claims of 100 or more persons," on the ground that they involve "common questions of law or fact." Even if this case could be said to involve the claims of 100 or more citizens of Mississippi (and it cannot), it would not propose a "joint[]" trial of such claims – and certainly not on the ground that they involve "common questions of law or fact." Rather, this action will involve solely a trial of the *State's* claims.

The "mass action" definition focuses on the actual *trial* proceeding itself. Congress specified that claims of 100 plaintiffs "consolidated or coordinated solely for pretrial proceedings" do not qualify as "mass actions." *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). In other words, even if 100 or more Mississippi consumers had been formally added to this case as plaintiffs in the state court prior to removal, and even if those consumers had asserted their own, independent claims for monetary relief (neither of which happened in this case), those plaintiffs would not have created CAFA jurisdiction if their claims had been consolidated with the State's claim *purely for pretrial purposes*. CAFA limits the

numerosity component of "mass actions" quite severely by including only actions in which the proposed *trial itself* would address the claims of at least 100 plaintiffs, and the Court of Appeals erred by misinterpreting the statute to include imaginary claims by hypothetical Mississippi consumers that were never going to be part of the *trial* of the State's claims.

The statute's reference to "common questions of law or fact" underscores the Court of Appeals' mistake. That language echoes the federal class action rule, Fed. R. Civ. P. 23(b)(3) ("questions of law or fact common to class members"), which involves a rigorous analysis of the evidentiary proof that a class intends to offer at trial to demonstrate commonality and predominance. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). A class representative cannot demonstrate the existence of "common questions" by loose reference to the interests of absent class members. Rather, the requisite "common questions" can be shown only through close analysis of the specific legal claims that absent class members possess and the precise manner in which they would be proven at trial. Here, only the State's claims will need to be proven at trial. There will be no need to inquire into non-existent class members' claims. The phrase "common questions of law or fact" confirms that CAFA's "mass action" definition refers not to *parens patriae* actions but instead to actions where multiple named plaintiffs are joined in a single suit asserting concrete legal claims that raise common questions of fact or law.

2. The Ban On The Creation Of A "Mass Action" By A Defendant's Joinder Motion.

In addition to requiring that a "mass action" include the claims of at least 100 plaintiffs "proposed to be tried jointly," subsection 1332(d)(11) provides that "the term 'mass action' shall *not* include any civil action in which . . . the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (emphasis added). Hence, Congress anticipated that defendants might attempt to join the claims of additional plaintiffs in order to produce a "mass action" and specifically ruled out such a tactic by instructing that a defendant's joinder could not create a mass action eligible for removal under CAFA.

Respondents are attempting to achieve indirectly what they cannot accomplish directly. While never formally moving to consolidate the claims of absent Mississippi consumers, Respondents urge that those claims be treated as if they had been asserted and consolidated for purposes of removal under CAFA. The effort to "pierce the pleadings" to have the Court consider the claims of absent plaintiffs on a "claim-by-claim" basis is an impermissible end-run around the specific statutory ban on a defendant's joinder of claims to create a "mass action." Respondents' argument is foreclosed by the considered statutory limitations on the "mass action" definition.

3. The $75,000 Amount-In-Controversy Limitation In The "Mass Action" Definition.

The second clause in CAFA's "mass action" definition limits federal removal jurisdiction in a

"mass action" to "those plaintiffs" whose "claims" in a mass action satisfy the $75,000 jurisdictional amount in controversy requirements of federal diversity jurisdiction. 28 U.S.C. § 1332(d)(11)(B)(i) This clause reinforces Petitioner's interpretation because it presupposes the existence of individually identifiable "plaintiffs" whose claims do not meet the jurisdictional prerequisite and would therefore have to be remanded to state court, while the claims of other plaintiffs remain in federal court.

Although such a process makes sense in the context where multiple named plaintiffs (each with formally asserted, distinct claims) are joined in a single suit, it does not make sense in the context of a *parens patriae* action. In an action brought by an attorney general, it would be wholly impractical for a trial court to examine the circumstances of each consumer in a State, to ensure that each one meets the federal amount-in-controversy threshold, and to remand to state court the supposed "claims" of particular consumers (who had never sued in the first place) falling below the federal diversity amount-in-controversy requirement. In such a scenario, the consumers would not be before the court and would not have asserted any actual claims. There would be no way to obtain information about their situation, and the court would have to speculate about the nature of any "claims" they might later bring. As a purely administrative matter, it would not be feasible to conduct individualized judicial hearings to identify, investigate, and ascertain the potential claims of hundreds of thousands (or millions) of consumers.

The illogical and impractical nature of such a process confirms that the "mass action" definition

does not extend to attorney general suits. Indeed, in this very case, the District Court anticipated that the Fifth Circuit's jurisdictional approach would require it to sever and remand to state court the injunctive relief, civil penalty claims, and demand for restitution for individual losses less than or equal to the $75,000 jurisdictional amount required by 28 U.S.C. § 1332(d)(11)(B)(i). *See* Pet. App. 52a-53a.

Such an unworkable system would vastly complicate judicial administration, and there is no reason to interpret a jurisdictional statute to lead to such an unreasonable result. As this Court recognized in *Hertz*, a CAFA case, "administrative simplicity is a major virtue in a jurisdictional statute." 559 U.S. at 79. Accordingly, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Id.* at 80; *see also Standard Fire*, 133 S. Ct. at 1350 ("when judges must decide jurisdictional matters, simplicity is a virtue"); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (rejecting jurisdictional interpretation that would "radically expand the class of removable cases," and "undermine the clarity and ease of administration of the well-pleaded-complaint doctrine"); *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (A jurisdictional boundary "should . . . if possible, be a bright line, so that very little thought is required to enable judges to keep inside it.") (quoting ZECHARIAH CHAFEE, THE THOMAS M. COOLEY LECTURES, SOME PROBLEMS OF EQUITY 312 (1950) (in turn quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))).

4. The Provision Barring Transfer of Mass Actions Without Plaintiffs' Consent.

A similar practical problem arises from a provision in CAFA barring transfer of a mass action to another court "unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(i). Use of the word "plaintiffs" reinforces the interpretation of subsection (d)(11)(B) that throughout the statute "plaintiffs" means *named* parties.

Moreover, in a *parens patriae* action, the State is the sole plaintiff. The thousands (or millions) of absent consumers cited by the Court of Appeals are not plaintiffs, and there is no mechanism through which they could request or consent to transfer of the action pursuant to 28 U.S.C. § 1407. Nothing in CAFA suggests a procedure for a district court to identify and communicate with absent consumers – let alone to determine their views on the issue of transfer. Again, the complex and burdensome implications of the Court of Appeals' approach are strong reasons to reject it as a matter of statutory interpretation.

5. The "General Public" Exception.

CAFA contains a "general public" exception to mass action jurisdiction, 28 U.S.C. § 1332(d)(11)(B)(ii)(III), which provides that the term "mass action" does not include any action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." This provision is strong evidence that

Congress did not intend *parens patriae* suits to qualify as "mass actions." Indeed, as shown in Part III-B, *infra*, this provision mandates reversal in this case, even under the Fifth Circuit's "claim-by-claim" approach.

The Fifth Circuit acknowledged that its interpretation of CAFA would negate the "general public" exception by rendering it "statutory surplusage when the State brings consumer-related actions such as the one before us today." Pet. App. 10a n. 1. According to the Court of Appeals, under its "claim-by-claim" approach, "the public exception has no relevance." *Id.*; *see also id.* at 10a ("our finding vitiates the application of the exception"). This startling acknowledgement flies in the face of elementary principles of statutory interpretation. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).[5]

The Fifth Circuit's interpretation, which sweeps *parens patriae* cases into federal court and renders the "general public" exception a dead letter, is inconsistent with the structure of the CAFA scheme and violates basic rules of statutory construction.

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[5] The Court of Appeals' assertion that the same "surplusage" would result under Petitioner's interpretation of the CAFA mass action definition (Pet. App. 10a n.1) is not true. Under Petitioner's construction, *parens patriae* suits filed by attorneys general are outside CAFA's scope, but the "general public" exception still has meaning because it applies to suits filed by private plaintiffs on behalf of the general public.

6. Other Federal Statutes Recognizing That *Parens Patriae* Actions Are Not Class Actions.

Other federal statutes, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 15c, treat *parens patriae* actions as procedurally distinct from class actions. This Court has explained that, in adopting the HSR Act, "Congress focused on the difficulty of achieving class certification of consumer actions under Rule 23 of the Federal Rules of Civil Procedure and the complexity of measuring and distributing damages in such cases." *Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1983). "To remedy these problems, the 1976 [HSR] statute permits State attorneys general the right to institute *parens patriae* suits on behalf of State residents, [and] exempts such suits from the class action requirements of Rule 23." *Id.*

Congress thereby recognized that *parens patriae* actions are not "class actions." The distinction is particularly salient in Mississippi, whose law does not even permit class actions. Pet. App. 3a.

Although this case involves CAFA's definition of "mass action" rather than "class action," the Court of Appeals' decision creates a tension between CAFA and the HSR Act. Under the Court of Appeals' interpretation, *parens patriae* actions qualify as "mass actions," and thereby as "class actions," by virtue of the cross-references within CAFA. *See* 28 U.S.C. § 1332(d)(11)(A).

Congress is not absolutely precluded from using the same term in different ways in different statutes, but this Court often consults related or similar statutes in determining the meaning of statutory

terms. *E.g.*, *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 150-51 (1984). Given that the HSR Act treats state *parens patriae* actions as distinct from class actions, CAFA should not be construed as providing precisely the opposite result. Thus, the Antitrust Modernization Commission took the position that CAFA "does not apply to *parens patriae* actions by state attorneys general." Report and Recommendations 272 (April 2007).

CAFA should be interpreted to exclude attorney general *parens patriae* actions, consistent with the HSR Act.

C. If There Were Any Statutory Ambiguity, Longstanding Principles of Federalism Would Be Dispositive.

If CAFA were unclear (and it is not), principles of federalism would dictate the proper result in this case: that CAFA does not extend to state *parens patriae* suits.

1. Narrow Construction of Removal Statutes.

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes should be narrowly construed. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986). This Court has adopted a policy of "strict construction" of removal statutes because of "'[d]ue regard for the rightful independence of state governments.'" *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Hence, "statutory procedures

for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Holmes Group*, 535 U.S. at 832 ("our cases addressing removal require" "[d]ue regard for the rightful independence of state governments"). CAFA did not change that fundamental and longstanding rule. *See Hertz Corp.*, 559 U.S. at 96.

The Court of Appeals' decision violates that principle. The Fifth Circuit engrafted onto the text of CAFA a new and manipulable standard – nowhere grounded in the statutory language. The Court of Appeals consulted what it called "a series of diverse statements" in the Complaint, Pet. App. 5a, its assessment of "the injury [the Complaint] seeks to remedy with money damages," *id.*, "the statutory bases of the State's suit," *id.* at 6a, "common law *parens patriae* authority," *id.*, and the "nature of the injury in this case." *Id.* at 7a. The Fifth Circuit's "claim-by-claim" approach is not so much a jurisdictional *test* as an invitation to undertake an open-ended inquiry into a variety of considerations, without any explanation of how these factors work together or how they are to be weighed (if it all). The Fifth Circuit's proposal is the opposite of a clear and predictable jurisdictional standard.

Rather than narrowly construing CAFA, the Court of Appeals *expanded* it, via a fuzzy and impressionistic approach that will complicate jurisdictional inquiries, increase uncertainty as to the scope of CAFA, disregard the independence of state governments, and foster further litigation.

2. State Sovereignty Principles.

The principle favoring narrow construction of jurisdictional statutes has special force in this context because the Petitioner Attorney General is the chief legal officer of a sovereign state. Petitioner filed this action under Mississippi law in the Mississippi courts, on behalf of the State and its citizenry, to enforce state antitrust and consumer protection laws applicable only in Mississippi. To prevent States from pursuing their own actions in their own courts is to risk trampling on the dignity of the States, to which they are entitled "as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 709 (1999).

The Fifth Circuit's approach to CAFA would appear to allow removal of *parens patriae* actions on a routine basis, depriving States of the ability to use their own courts to implement state statutory schemes. The Court of Appeals' decision would risk making States dependent on federal courts for the interpretation and enforcement of their own laws. Yet this Court has held that principles of state sovereignty forbid a situation where the "'the course of [States'] public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent.'" *Id.* at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

There is an important Eleventh Amendment question at stake. This Court has never addressed "whether a state as a plaintiff suing defendants over whom it has regulatory authority in state court under its own state laws may be removed to federal

court on diversity grounds under CAFA, rather than federal question jurisdiction." *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 (5th Cir. 2008); *see* Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 J. MARSHALL L. REV. 513, 543 (2004) (concluding that removal violates "[d]ignity, functioning of the states, and federalism").[6]

A State, by commencing an enforcement action under its own laws in its own courts, does not necessarily consent to removal of the suit to federal court. In *Lapides v. Board of Regents*, 535 U.S. 613 (2002), this Court held that a State's removal of a case to federal court constituted waiver of its Eleventh Amendment immunity, but it pointedly noted that "the Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary," *id.* at 622, as it is here. Waivers of state immunity are strictly construed, and consent to suit in state court is not equivalent to consent to suit in federal court. *E.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011).

This Court need not decide the Eleventh Amendment question in order to conclude that (at the bare minimum) the Court of Appeals' approach violates the "etiquette of federalism." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J.,

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[6] To be sure, the text of the Eleventh Amendment extends only to suits against States. However, sovereign immunity "is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 729 (1999); *see also Nevada v. Hall*, 440 U.S. 410, 418 (1979).

concurring). The decision below impermissibly interferes with the States' authority to enforce their own laws in their own courts and thereby offends the principle that States must be treated in a manner consistent with their sovereign status. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing need to "accord[] the States the respect owed them as members of the federation"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State").

One would expect a particularly strong expression of statutory language if Congress had genuinely intended to interfere with the prerogatives of a state attorney general in such an extraordinary manner. As this Court has noted, "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983).

3. Federal Solicitude For State Courts.

The decision below inappropriately transforms what is essentially a state matter into a federal case and threatens to disrupt the well established procedures by which States use their own courts to enforce state antitrust, consumer protection, and other statutory schemes. Federalism and comity concerns militate in favor of allowing state attorney general lawsuits to be decided in state court.

This Court has long recognized that a State has legitimate reasons in ensuring that state courts are the forums in which unsettled questions of state law are resolved, particularly when those questions arise

under state regulatory schemes. For example, the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), allows a federal court to dismiss a case if it presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

Similarly, the doctrine of *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), authorizes federal courts to abstain in cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law. *Id.* at 28. These principles of federalism and comity form "part of the common-law background against which the statutes conferring jurisdiction were enacted." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989).

The need to permit state courts to articulate state law is particularly acute in the case at bar. Petitioner brings the instant claims under the MAA and MCPA – statutory schemes enacted by the Mississippi legislature. The state legislature has made a considered judgment about what the public interest of Mississippi requires, and the statutory schemes provide for enforcement in state court by the Attorney General. The Fifth Circuit's decision in this case overrides that legislative judgment and strips the Mississippi legislature of its power to

devise a statutory scheme enforceable by the Attorney General in state court.

The Fifth Circuit expressed uncertainty over Mississippi law and cited the need for "a more authoritative precedent" than an "unpublished Mississippi state case (from a chancery trial court)." Pet. App. 6a, 7a. But any presence of state-law questions simply underscores the defect in the Fifth Circuit's interpretation of CAFA. A state court, not a federal court, is the proper forum for the adjudication of open questions under the MAA and MCPA. As Judge Easterbrook observed, in the course of bemoaning the proliferation of federal jurisdiction, "a coordinate system of jurisdiction in which federal courts apply rules of the states' creation presupposes a substantial body of decisions by state courts. It is hard to be a witty ventriloquist's dummy when the ventriloquist has laryngitis." *Proimos v. Fair Auto. Repair, Inc.*, 808 F.2d 1273, 1276 (7th Cir. 1987).

Nothing in CAFA indicates that Congress intended for quintessential state-law issues to be decided in federal court. The Court of Appeals' approach threatens to disrupt the enforcement of numerous state statutory schemes in state court.

D. Legislative History Confirms That CAFA Does Not Extend To State *Parens Patriae* Actions.

Because the text and structure of CAFA are clear, and because any ambiguity would need to be resolved in favor of a narrow construction of CAFA, there is no reason to consult legislative history in this case. However, that history confirms that CAFA does not encompass state *parens patriae* actions.

1. The CAFA Committee Report.

Nothing in the CAFA Committee Report warned the States that Congress was about to interfere with the prerogatives of their chief legal officers to bring *parens patriae* actions in state court. Instead, the CAFA Committee Report stated that the bill was consistent with "basic federalism principles" and "the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, 109th Cong., 1st Sess. 24 (Feb. 28, 2005). The Report explained that the legislation "promote[d] the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." *Id.* at 61.

The Report described "mass actions" as "suits that are brought on behalf of numerous *named* plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status." *Id.* at 46 (emphasis added). The Report thus underscored that "mass actions" are suits brought by multiple named plaintiffs – not *parens patriae* actions. *See also id.* ("Under subsection 1332(d)(11), any civil action in which 100 or more *named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes.") (emphasis added). The Report also specified that a "mass action" meeting CAFA's jurisdictional requirements "would not be eligible for federal jurisdiction if . . . the defendants (not the plaintiffs) sought to join the claims." *Id.*; *see also* H.R. Rep. No. 108-144, at 35 (2003) (describing "mass actions" as "suits that are brought on behalf of hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of

law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part") (emphasis added).

The class action problems identified in the Committee Report have nothing to do with a *parens patriae* action brought by a single State, through its politically accountable chief legal officer, asserting claims under the State's own laws. Instead, the CAFA Committee Report cited the need to extend federal jurisdiction to "large-scale, interstate class actions involving thousands of plaintiffs from multiple states," S. Rep. No. 109-14, at 11, where "one state's courts try to dictate its laws to 49 other jurisdictions." *Id.* at 26. Those issues are not present here. "[T]he primary problem that the statute was intended to solve" (*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561 (2013)), has nothing to do with *parens patriae* actions brought by state attorneys general.

2. Express Reassurances To States That CAFA Did Not Include State Attorney General Actions.

During the congressional consideration of CAFA, an amendment was proposed clarifying that CAFA was not applicable to actions brought by a state attorney general. 151 Cong. Rec. S1157 (daily ed. Feb. 9, 2005). Forty-six state attorneys general wrote to Congress in support of the amendment, arguing that "certain provisions of [the bill] might be misinterpreted to hamper the ability of the Attorneys General to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm." *Id.* at S1158-59. CAFA's sponsors opposed the amendment

because they said it was "unnecessary," as it was "perfectly clear" that the bill would not apply to *parens patriae* actions, which were "excluded from the reach of the bill." 151 Cong. Rec. at S1163, S1164 (Sen. Hatch). For example, Sen. Cornyn assured the Senate:

> [W]e certainly do not need an amendment like this to protect the States or the attorneys general against a potential misinterpretation of S. 5, the Class Action Reform bill. . . . I think it is very plain that no power of the State attorney general is impeded by virtue of S. 5, or will be once it is signed into law. . . . [As to] statutes that are typical of every State-deceptive trade practice acts and consumer protection statutes-which . . . specifically authorize the attorney general to seek remedies on behalf of aggrieved consumers[,] . . . [t]his bill certainly would not encroach on that authority. . . . [W]hen State law and the State Constitution specifically provide for the right of an attorney general, a State attorney general, to sue on behalf of his State's citizens, then this bill, when made a law, will not in any way impede that endeavor.

Id. at S1161-62 (Sen. Cornyn). Each of the other CAFA proponents who spoke in opposition to the amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id.* at S1160 (Sen. Specter) (amendment "is not necessary"); *id.* at S1161 (Sen. Carper) ("For most attorneys general who wish to file a case on behalf of their citizens

against some defendant, they have the opportunity to use *parens patriae*."); *id.* at S1163 (Sen. Grassley) ("[B]ecause almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition. That means that cases brought by State attorneys general will not be affected by this bill.").

Sen. Pryor concluded:

> I hope when this law, if it passes, S. 5, is challenged, and it will be at some point or be litigated at some point, and a State attorney general tries to pursue some sort of action and there is a challenge saying the State cannot do it, I hope the courts will recognize the legislative history we developed today. The intention of this Senate and the conference is not to limit any existing rights or any existing abilities of the State attorneys general in pursuing cases they may deem appropriate to pursue.

Id. at S1164.

Whatever force might be accorded legislative history in the ordinary case, such explicit reassurances on the floor of a House of Congress are meaningful in a world where the structural protections of federalism depend on political and procedural safeguards. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and explaining that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created

limitations on federal power. The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation."). When the proponents of federal legislation expressly and repeatedly reassure the States that a bill will not trench on their sovereign prerogatives, this Court should be wary of according precisely the opposite interpretation to the statute.

For all these reasons, the text, structure, and history of CAFA all show that it does not cover state attorney general actions.

II. THE NATURE OF *PARENS PATRIAE* ACTIONS AND THE REAL PARTY IN INTEREST TEST CONFIRM THAT AN ATTORNEY GENERAL SUIT IS NOT A MASS ACTION UNDER CAFA.

Apart from the text and history of CAFA, the history of *parens patriae* actions and the longstanding real-party-in-interest test demonstrate that a State plaintiff is not a nominal party in an attorney general action.

A. A State Is Properly The Sole Plaintiff In A *Parens Patriae* Action.

The Fifth Circuit held that, under the "claim-by-claim" approach, both the State and private citizens of Mississippi are real "parties" in interest in this suit. Pet. App. 8a-9a. That holding is inconsistent with the nature of a *parens patriae* action, under which a State is properly the sole plaintiff in the action.

1. The Nature Of *Parens Patriae* Actions.

The "parent of the country" action was rooted in the English concept of the "royal prerogative," but has expanded from its common-law origins. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). This Court has described the "prerogative of *parens patriae*" as "inherent in the supreme power of every State." *Id.*

A State is the real party in interest in a *parens patriae* case when it "articulate[s] an interest apart from the interests of particular private parties" and "express[es] a quasi-sovereign interest." *Id.* at 607. This Court has explained that one qualifying interest is the "power to create and enforce a legal code, both civil and criminal." *Id.* at 601. In addition, "a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 607. This Court has recognized quasi-sovereign interests where the State (1) "allege[s] injury to a sufficiently substantial segment of its population," including the "indirect effects of the injury," and (2) alleges the kind of injury "that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

When a State identifies a quasi-sovereign interest in the claim asserted, it is not merely a "nominal party," but rather is the real party in interest, even where the benefits might accrue to particular individuals within the State. *Id.* at 608 ("a State does have an interest, *independent of the benefits that might accrue to any particular individual*") (emphasis added).

Here, Mississippi has alleged injury to a significant segment of its population – virtually every consumer who during the relevant time period purchased an LCD-containing product, which include laptops, desktop computer monitors, mobile phones, digital cameras, video cameras, televisions, car navigation systems, many kinds of toys, and other electronic devices. *See* Complaint, ¶¶ 145, 201 (Resp. App. 46a, 63a); *see also* Pet. App. 49a-50a. The District Court described the number of injured consumers as "hundreds of thousands if not millions," *id.* at 55a, and appropriately considered the indirect effects of the injury as well. *Id.* at 50a. The Complaint shows (as the Court of Appeals acknowledged) that the injury caused by Respondents includes "'generalized harm' to the State as a whole." Pet. App. 5a; *see also* Complaint, ¶¶ 1, 194(g) (Resp. App. 2a-3a, 62a). Because Mississippi has established that a sufficiently substantial segment of the State's population has been injured, it has articulated a State interest apart from the interests of those private individuals.

In addition, Mississippi's legislature has enacted antitrust and consumer protection statutes authorizing the Attorney General to address precisely the kind of injury alleged here, which independently confirms the State's sovereign and quasi-sovereign interest. *See* Pet. App. 66a-76a (setting out relevant portions of the Mississippi Antitrust Act and Mississippi Consumer Protection Act). Mississippi has asserted sovereign and quasi-sovereign interests in the Attorney General's enforcement of state consumer protection and antitrust laws, as recognized in *Alfred L. Snapp & Son*, 458 U.S. at 601 ("enforc[ing] a legal code, both

civil and criminal"). This Court has observed that a sovereign or quasi-sovereign interest is adequately articulated when "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607. Here, Mississippi has gone further by codifying the Attorney General's authority to enforce those laws in the name of the State as sole plaintiff.

Under the MAA, only acts "inimical to public welfare" are subject to enforcement. Miss. Code § 75-21-1. The MAA authorizes the Attorney General "to enforce the civil features of the antitrust laws of this state by appropriate legal proceedings and suits at law or in equity." *Id.* at § 75-21-37. It provides that "[a]ll such suits shall be brought by and in the name of the State of Mississippi upon the relation of the attorney general or an authorized district attorney." *Id.*

Similarly, the MCPA authorizes suit for injunctive relief by the Attorney General when "proceedings would be in the public interest." *Id.* at § 75-24-9. The MCPA authorizes other forms of relief in Attorney General actions, including damages, civil penalties, and a reasonable attorney's fee. *Id.* at §§ 75-24-11, 75-24-19(1)(b).

Nothing in this statutory authority requires the Attorney General in a *parens patriae* action to attempt to try citizens' claims jointly with the State's own claims. Indeed, Mississippi's statutory regime demonstrates a legislative preference for *parens patriae* actions over private actions. There are no private treble damages under either the MAA or MCPA (only claims for damages "and in addition a penalty of five hundred dollars" under the MAA, *id.*

at § 75-21-9), no class actions in Mississippi (Pet. App. 3a), and no attorney fee-shifting for private plaintiffs under the MAA and MCPA. Only the Attorney General is eligible to receive "a reasonable attorney's fee" under the MCPA, Miss. Code. § 75-24-19(1)(b), and only the Attorney General may recover civil penalties under the MAA and MCPA. *Id.* at §§ 75-21-7, 75-24-19(1)(b).

Mississippi has also asserted a quasi-sovereign interest in securing an honest marketplace and the economic well-being of its citizens. *See Alfred L. Snapp & Son*, 458 U.S. at 607 (recognizing State's "interest in the health and well-being—both physical and economic—of its residents in general"). Such economic interests are firmly established as sufficient bases for *parens patriae* actions. For example, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court recognized a quasi-sovereign interest in ensuring consumers' continued access to natural gas, noting that the "health, comfort, and welfare" of a substantial portion of State's population was "seriously jeopardized" by a threatened interruption in the supply of gas. *Id.* at 592. This Court opined that "the state, as the representative of the public, has an interest *apart from that of the individuals affected*. It is not merely a remote or ethical interest, but one which is immediate and recognized by law." *Id.* (emphasis added); *see also Maryland v. Louisiana*, 451 U.S. 725, 738-39 (1981) (affirming state authority to bring *parens patriae* action to challenge natural gas tax paid by consumers in the State).

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), this Court treated an antitrust claim as a quasi-sovereign interest because trade

barriers "may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets." *Id.* at 450. This Court found that "Georgia has an interest *apart from that of particular individuals who may be affected.* Georgia's interest is not remote; it is immediate." *Id.* at 451 (emphasis added).

The HSR Act, 15 U.S.C. § 15c(a), which codifies the authority of state attorneys general to sue as *parens patriae* in antitrust cases (as discussed in Part I-B-6, *supra*), reflects Congress' agreement that a State's interest in protecting its citizens from a restraint of trade is sufficient to provide the foundation for a *parens patriae* action.

Accordingly, Mississippi plainly has established the elements of a *parens patriae* action and is the proper plaintiff in this case. A State has a separate and distinct interest in ensuring that its economy is free from anticompetitive and deceptive conduct, and its interest in that regard does not merely duplicate the private interests of its citizens.

2. A State's Ability To Bring A *Parens Patriae* Case As The Sole Plaintiff.

The Court of Appeals did not deny that the State was *a* proper plaintiff in this case. Pet. App. 6a-8a. Rather, it held that "the real parties in interest in this suit include both the State and individual consumers of LCD products." *Id.* at 8a-9a. The Court of Appeals' holding misconstrues the *parens patriae* doctrine. In a *parens patriae* action, the

State may prosecute the case as the *sole* real party in interest, without joining or naming citizens as additional plaintiffs, because the State has its *own* sovereign or quasi-sovereign interest to assert. The State is not simply a vehicle for the assertion of private claims.

This Court has long recognized the distinction between *parens patriae* suits and private actions by citizens of a state. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]t must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. . . . That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."). *Parens patriae* actions need not (and in fact ordinarily do not) involve the joinder of the constituent citizens who are represented by the State. As this Court has opined, *parens patriae* actions are cases in which the State, by definition, "'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 373 (1953). *Parens patriae* cases are typically not subject to intervention and joinder by individual citizens: "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*

Absent a compelling showing of inadequate representation, an individual citizen is typically not even *permitted* to intervene in a *parens patriae* case. *See United States v. Hooker Chem. & Plastics Corp.* 749 F.2d 968, 985 (2d Cir. 1984) (per Friendly, J.) (there must be "a strong affirmative showing that

the sovereign is not fairly representing the interests of the applicant"); *see also United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) ("The proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*.").

The Fifth Circuit's "claim-by-claim" approach would have led to different results in this Court's leading *parens patriae* decisions, making those cases removable under CAFA. For example, under the Fifth Circuit's approach, the Commonwealth of Puerto Rico would not have been the sole plaintiff in *Alfred L. Snapp & Son*. The farmers who lost their jobs because of the discrimination that formed the basis of the lawsuit would have been "real parties in interest," rendering the case a "mass action" under CAFA. The farmers certainly had a right to file suits against the discrimination.[7] But that did not alter the nature of Puerto Rico's interests.

Similarly, the citizens of Missouri who were injured by the flow of sewage from Illinois in *Missouri v. Illinois* would have qualified as "real parties in interest," and the *parens patriae* action in that case would have been removable as well. *See Missouri v. Illinois*, 180 U.S. 208, 211–12 (1901) (describing injuries to people and businesses). The same could be said of the group of citizens who were deprived of access to natural gas in *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) ("The[ ]

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[7] *Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928, 934 (W.D. Va. 1979), *rev'd*, 632 F.2d 365 (4th Cir. 1980), *aff'd sub nom. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (noting lawsuits filed by individual workers).

[citizens'] health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream.").

In fact, "[w]hen the focus is on real parties in interest, all the Court's classic *parens patriae* cases begin to seem like removable class actions." Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 140 (2011). The more a State's action asserts a sovereign or quasi-sovereign interest (and thus the more clearly it is a legitimate *parens patriae* action), the more likely the Fifth Circuit's approach would find it removable under CAFA. After all, it is unlikely that a sovereign or quasi-sovereign interest would be based on injury to less than 100 citizens or involve less than $5 million in controversy. *Id.*

There is nothing in CAFA to suggest that it works such a radical change. The Fifth Circuit's "claim-by-claim" approach overturns the longstanding recognition that the State is the only proper plaintiff in a typical *parens patriae* case. The new approach would substantially recast (if not effectively eliminate) the authority of a State to bring a *parens patriae* action in its own courts.

B. The Real Party In Interest Test Confirms That A State Is the Sole Plaintiff In An Attorney General Action.

1. The "Claim-by-Claim" Approach's Inconsistency With Settled Precedent.

The Fifth Circuit's "claim-by-claim" approach is impermissible for another reason: it is inconsistent

with the well established test for determining the "real party in interest," which confirms that a State is the proper plaintiff in a *parens patriae* case.

This Court has always evaluated whether a State is the real party in interest by evaluating the complaint and record *as a whole*. The Fifth Circuit expressly rejected the approach of "look[ing] to a state's complaint 'as a whole.'" Pet. App. 4a. Yet that test is exactly what this Court has mandated. In *In re New York*, 256 U.S. 490 (1921), for example, this Court determined whether a State was the real party in interest by looking at "the essential nature and effect of the proceeding, as it appears from the entire record." *Id.* at 500; *see also Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945) ("The government's interest must be determined in each case 'by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citation omitted); *In re Ayers*, 123 U.S. 443, 492 (1887) (instructing courts to "consider[] the nature of the case as presented on the *whole record*") (emphasis added).

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), where this Court upheld the power of a State to sue as *parens patriae* on behalf of individual shippers in an antitrust case, this Court considered the "gravamen" of the complaint as a whole: "This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers." *Id.* at 452.

Moreover, this Court has held that the State is the real party in interest where it has the power to control the litigation. However, the Fifth Circuit did not even consider that factor in its analysis. In *Kansas v. Colorado*, 533 U.S. 1 (2001), an original action in which one State filed suit seeking monetary relief against another, this Court held that the State was a proper plaintiff and that its requested relief did not run afoul of the Eleventh Amendment, even though damages were calculated in part on injuries to individual citizens, because "the record in this case plainly discloses that the State of Kansas has been in full control of this litigation since its inception. Its right to control the disposition of any recovery of damages is entirely unencumbered." *Id.* at 8.[8] *see also Knapp v. W. Vermont R. Co.*, 87 U.S. 117, 123 (1873) (trustees who sued for benefit of others and not themselves were real parties in interest where the claim accrued to them, they controlled the litigation and were responsible for conducting it, and where beneficiaries could not prevent institution or prosecution of actions or exercise any control over them).

The only cases holding that the named plaintiff was not the real party in interest are those where none of the relief benefitted the plaintiff State, and all of the relief benefitted a limited number of other parties. *E.g.*, *Oklahoma v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220

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[8] This Court rejected an objection that Kansas was not the real party in interest because damages were to be based in part on losses suffered by farmers. 533 U.S.. at 6-7. "[N]either the measure of damages that we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction." *Id.* at 9.

U.S. 277, 289 (1911). Even these holdings support Petitioner here, because the conclusion that the State was merely a nominal party required an analysis of the complaint as a whole.

Not surprisingly, every other Court of Appeals to have considered the real-party-in-interest question has rejected the Fifth Circuit's "claim-by-claim" approach in favor of the "whole case" approach. *See* n. 4, *supra*. The concurring judge below observed that "every court of appeals to address the issue since *Caldwell* has rejected its approach." Pet. App. 16a. The Fifth Circuit, in both *Caldwell* and the case below, ignored this Court's required framework and created its own ill-advised test.

The Fifth Circuit pointed to no language in CAFA, and in fact there is no statutory language to support a claim-by-claim approach in evaluating the real party in interest in a *parens patriae* case. Nothing in CAFA provides that when there is one plaintiff, such as a State bringing a *parens patriae* action, the plaintiff's claims should be deconstructed to determine the real party in interest.

Indeed, a "claim-by-claim" approach is inconsistent with longstanding jurisdictional principles. Article III, § 2 refers to "Cases" and "Controversies," not "claims." Congress demonstrated its agreement with this concept in the codification of supplemental jurisdiction in 28 U.S.C. § 1367, which authorizes courts to exercise jurisdiction over additional claims when those claims "form part of the same case or controversy under Article III of the United States Constitution." Hence, "claims are not to be treated independently;

they are to be examined in the context of how they relate to the larger case or controversy at issue."[9]

2. The Limited Power of a Court To Add Plaintiffs To A Lawsuit.

The "claim-by-claim" approach is illegitimate for another reason: even if private citizens in Mississippi could be regarded as real parties in interest (and they should not be), that would raise only a defective pleading issue to be addressed in state court. It would not support CAFA removal. If a State has not stated a proper *parens patriae* claim, its suit will be vulnerable to dismissal in state court, under state law. However, such a defect would not warrant removal of the action to federal court. At the removal stage, a federal court may neither order private parties added to the action nor treat the complaint as if those parties are present, and thereby justify removal. Any conjecture about future parties to be added to a lawsuit could not justify removal, in view of the rule that, "[f]or jurisdictional purposes, [judicial] inquiry is limited to examining the case as of the time it was filed in state court." *Standard Fire*, 133 S. Ct. at 1349 (internal quotation marks omitted). Subsequent events cannot create removal jurisdiction after the fact.

Nor do federal courts have the power simply to add parties to a lawsuit, based on their assessment of the real parties in interest. In *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005), this Court opined

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[9] Michael Jaeger, *Should They Stay or Should They Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court Under the Class Action Fairness Act?* 46 LOY. L.A. L. REV. 327, 351 (2012).

that, in determining jurisdiction, the federal courts have "no warrant . . . to inquire whether some other person might have been joined." *Id.* at 93 (federal courts should not "inquir[e] outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action") (citing *Knapp v. Railroad Co.*, 87 U.S. 117 (1873)). In reviewing prior decisions "employing 'real party to the controversy' terminology in describing who counts and who can be discounted for diversity purposes," *id.* at 91, the *Lincoln Property* Court noted these decisions fell into one of two categories: (1) using an "improperly or collusively" named party to create federal jurisdiction, or (2) using such a party to defeat federal jurisdiction. *Id.* at 91-92 (citations omitted). If the former category, the appropriate remedy is to dismiss the case for lack of subject matter jurisdiction. *See*, e.g., *Little v. Giles*, 118 U.S. 596, 600-07 (1886). If the latter, the remedy is to disregard the citizenship of the nominal party. *See, e.g., Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914).[10]

In no event is it permissible simply to pretend as though an absent party has been added or to compel the plaintiff to add unnamed parties to its lawsuit. A court cannot force the Attorney General to litigate in the posture of a plaintiff in a mass action or as a class representative, in order to confer federal jurisdiction. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE &

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[10] In *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), this Court conducted the real party in interest inquiry. The purpose, however, was to determine the real party in interest status of the named plaintiffs, not to add parties.

PROCEDURE § 1785 (3d ed. 1998) (recognizing the principle that a court "should not force the parties to try an action as a class suit when they prefer to litigate in their individual capacities").

Adding hundreds of thousands (or millions) of consumers as named plaintiffs in a *parens patriae* case is neither permissible nor practical, and the Fifth Circuit provided no clue as to how such an extraordinary step was to be taken. In the previous *Caldwell* case, the Fifth Circuit left it to the district court to determine how the individual Louisiana insurance policyholders could be added to the action, 536 F.3d at 430, with no suggestion of how the Louisiana Attorney General could possibly force private plaintiffs to join. Not surprisingly, none were ever added in that case, and the task would be utterly impossible here and in many other proceedings. The instant action involves "hundreds of thousands if not millions" (Pet. App. 55a) of consumers in Mississippi, with no paper trail of their purchases and relatively small losses to trace. *Id.* at 50a. As the District Court acknowledged, "electronics retailers permit customers to pay with cash and do not record personally identifiable information on every transaction. It is unlikely that the defendants have records identifying every Mississippian who purchased a product containing a LCD panel between 1996 and 2006." *Id.* Any attempt to add consumers as plaintiffs in this case would be futile.

The "claim-by-claim" approach, in other words, is a recipe for confusion, overreaching, and inconsistency. It departs from settled principles regarding the real-party-in-interest inquiry and should be rejected.

III. EVEN UNDER A "CLAIM-BY-CLAIM" APPROACH, THE JUDGMENT BELOW SHOULD BE REVERSED.

Even if this Court were to adopt the Fifth Circuit's "claim-by-claim" approach, it should still reverse the judgment below.

A. The State Is The Real Party In Interest In A *Parens Patriae* Case, Even Under A "Claim-by-Claim" Approach.

Even under the "claim-by-claim" approach, the Fifth Circuit erred in not finding that Mississippi is the real party in interest in this case, because it possesses both statutory and common-law *parens patriae* authority to assert the relief requested in the Complaint, pursuant to its sovereign and quasi-sovereign interests.

There are only two claims in this case: a claim by the State under the MAA and a claim by the State under the MCPA. Resp. App. 60a-64a (Complaint). In both cases, the statutory provisions on which the State relies are not those that a private citizen or consumer could invoke in bringing a damages claim against a defendant. The Complaint states that "Plaintiff, the State of Mississippi" seeks "its damages" and "restitution," to be awarded to "Plaintiff, the State of Mississippi," not to individual purchasers. *Id.* at 65a-66a. Hence, proceeding "claim by claim" in this case should have led the Court of Appeals to the obvious conclusion that both of the relevant legal claims in this case belong to the State, and neither belongs to Mississippi consumers.

The Fifth Circuit's approach of referring to "diverse statements" in a complaint and seeking to

infer "the nature of the injury involved" (Pet. App. 5a) is not an administrable jurisdictional test. The State is clearly the only real party in interest when *all* of the relief requested relates to the State's claims and *none* pertains to unasserted and purely hypothetical claims of individual consumers. The Court of Appeals spoke of the risk that the State might "extinguish the right and remedy the consumer has for his injury." Pet. App. 8a. But the claims of the State are entirely separate from those of consumers.

The Fifth Circuit attempted to draw a distinction between the government's ability "to seek restitution for its own injury" and its ability to seek restitution "for injuries suffered by parties other than the State." Pet. App. 6a. But even if the amount of restitution is computed according to transactions involving individual consumers, the relief sought remains restitution "to the State." Moreover, the remedy has a sufficient statewide deterrent effect on the defendants and other commercial actors as to qualify as a quasi-sovereign interest.

This Court has long upheld the power of the government to seek restitution based on injuries suffered by consumers and citizens, rather than the government's own pecuniary losses, even where the individual citizens and consumers might have a damages remedy available to them. *E.g.*, *Porter v. Warner Holding Co.*, 328 U.S. 395, 401 (1946) (upholding authority of government to seek restitution even where statute "authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf").

The Fifth Circuit speculated that "Mississippi could obtain restoration for harm to individual citizens, yet keep that money for itself." Pet. App. 8a. This Court rejected precisely such speculation as a basis for concern in *Kansas v. Colorado*, 533 U.S. at 9 (discussed at p. 48 & n. 8, *supra*), and in *Texas v. New Mexico*, 482 U.S. 124 (1987), where this Court held that enforcement of an interstate water compact by means of a recovery of money damages was within a State's proper pursuit of the "general public interest" in an original action, regardless of where the damages might ultimately flow. The Court noted the concern that "a money judgment might find its way into the general coffers of the State, rather than benefit those who were hurt." *Id.* at 132 n.7. That possibility was immaterial to this Court's holding:

> [T]he sovereign State was a proper plaintiff. It is wholly consistent with that view that the State should recover any damages that may be awarded, money it would be free to spend in the way it determines is in the public interest.

Id. (citation omitted). Speculation regarding the future disposition of any recovery cannot diminish a State's role as the real party in interest.[11]

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[11] The MCPA provides for a state court's discretionary authority to "make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property," pursuant to § 75-24-11. Even if a state court in this case subsequently entered orders directing the payment of monies to individual Mississippi consumers (an entirely conjectural future possibility), that would not alter the conclusion that the State is the real party in interest.

B. The "General Public" Exception Confirms That An Attorney General Suit Is Not A "Mass Action."

Even if the claim-by-claim approach were permissible, this Court should still reverse the judgment below under the "general public" exception of 28 U.S.C. § 1332(d)(11)(B)(ii)(III), which provides that the "mass action" definition "shall not include" a suit in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." The Court of Appeals' interpretation of this provision as a nullity (Pet. App. 9a-10a & n.1) offends basic principles of statutory interpretation. *See* p. 25, *supra*. Even under the claim-by-claim approach, the "general public" exception would exclude Mississippi's suit from the "mass action" definition.

The first prong of the "general public" exception refers to an action "on behalf of the general public," in contrast to "individual claimants or members of a purported class." Even under the Fifth Circuit's view that Mississippi consumers were real parties in interest, Pet. App. 6a-9a, the number of Mississippi consumers injured by Respondents' misconduct is clearly so high that the instant case qualifies as being brought "on behalf of the general public." The enormous group of affected consumers cannot be considered merely "individual claimants or members of a purported class," within the meaning of the statutory exception.

The affected consumers number in the "hundreds of thousands if not millions." Pet. App.

55a. As the District Court found, the LCD-containing electronic devices at issue include such commonly used products as mobile phones, televisions, toys, and computers. *See* p. 40, *supra*. The Court opined that, "[i]f this collection of items did not implicate the overall economic well-being of Mississippi's citizens, then the Court would be hard pressed to find something which does." Pet. App. 50a. The District Court properly concluded that "[t]he alleged price-fixing was so broad and pervasive as to affect the general public, and the State's claims in this suit are asserted on behalf of the general public." *Id.*

The District Court's construction of the phrase "general public" was correct. The "general public" refers to "ordinary people in society, rather than people who are considered to be important or who belong to a particular group."[12] The term need not imply 100% coverage of the entire citizenry, and statutes use the term "general public" in circumstances where only a portion of the populace is involved in the activities in question. The Bankruptcy Code, for example, imposes disclosure requirements for advertisements "of bankruptcy assistance services . . directed to *the general public*." 11 U.S.C. § 528(a)(3) (emphasis added). Similarly, federal law prohibits discrimination on the basis of disability in "transportation by bus, rail, or any other conveyance (other than by aircraft) that

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[12] MACMILLAN DICTIONARY (available at http://www.macmillandictionary.com) (last visited July 16, 2013); *see also* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 2000) (general: "not limited to one class, field, product, service, etc.; miscellaneous: *the general public*").

provides the *general public* with general or special service." 42 U.S.C. § 12181(10) (emphasis added).

It would be unreasonable to restrict the "general public" exception to instances in which literally every citizen of a State has a stake in the matter before the court. The "general public" exception is not limited to suits for injunctive relief but also applies to actions for damages. 28 U.S.C. § 1332(d)(11)(B). No action for damages, whether an antitrust, environmental, or consumer protection case, includes every member of the citizenry. No products (even such common ones as milk, gasoline, and cellphones) are used by every consumer. All actions concerning such products involve a "subset" of citizens. Further, when a State protects the integrity of a market, it protects all product buyers and *potential* buyers. Thus, when a State brings a consumer protection or antitrust case, it vindicates the interests of all those unidentified would-be purchasers who did not buy a product because of an inflated price or a deceptive marketing practice. Accordingly, the first prong of the "general public" exception is met here.

The second prong of the "general public" exception requires that the action be brought "pursuant to a State statute specifically authorizing such action." There can be no doubt that the second prong is met in this case. Petitioner's action was filed pursuant to both the MAA and the MCPA, and both statutes specifically authorize the Attorney General to bring precisely the kind of suit involved here. *See* pp. 40-42, *supra*. Under any interpretation of the "general public" exception, the second prong is clearly satisfied.

Accordingly, even if this Court were to adopt a "claim-by-claim" approach, it should still reverse the judgment below by applying the "general public" exception.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

When a state attorney general brings a civil action asserting restitution claims under state law on behalf of thousands of private purchasers to "restore to any person in interest" the money they allegedly overpaid, are the injured persons the real parties in interest to those restitution claims, and therefore is the action one "in which monetary relief claims of 100 or more persons are proposed to be tried jointly" under the Class Action Fairness Act?

RULE 29.6 STATEMENT

Respondents refer to the Rule 29.6 statement included in the Brief for Respondents filed with this Court on April 24, 2013.

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INTRODUCTION AND STATEMENT OF THE CASE

The Class Action Fairness Act of 2005 ("CAFA") radically altered the grounds for removing certain types of actions from state court to federal court under diversity jurisdiction. Concerned about abuses in state-court adjudication of class actions, Congress abrogated the judge-made "complete diversity" rule, replacing it with a more easily satisfied "minimal diversity" standard under which removal turns on whether there is *any* diversity of citizenship between the two sides of the action. Congress further provided that a "mass action," defined as a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact," 28 U.S.C. § 1332(d)(11)(B)(i), shall be deemed to be removable as a class action if it "otherwise meets" the applicable statutory requirements, *id.* § 1332(d)(11)(A).

As the Fifth Circuit held below, the plain language of the mass-action definition requires that a court analyze the real parties in interest to the claims to determine if the action is one "in which monetary relief claims of 100 or more persons" are to be tried jointly. That plain-language construction finds support in more than a century of jurisprudence analyzing diversity jurisdiction by looking to the real parties in interest. Moreover, this Court has held that when the government, incident to its law-enforcement powers, seeks restitution for overpayments by private persons, those injured persons are the real parties in interest whose claims are adjudicated by the court ordering restitution.

The Fifth Circuit properly construed the Mississippi Attorney General's private-purchaser restitution claims under Mississippi law to seek restitution on behalf of those injured persons. Because those claims are on behalf of more than 100 persons for amounts in excess of $5 million, the action was properly removed as a mass action.

There is no statutory exemption for state attorney general actions, whether described as *parens patriae* or otherwise. Indeed, CAFA was designed to capture statutory *parens patriae* actions brought by state attorneys general on behalf of injured persons. The Attorney General's contentions that removal here would constitute "an extraordinary invasion into state sovereign prerogatives," and "[u]ltimately, this is a case about federalism and respect for the institutional sovereignty of States," Br. 3, 10, are misguided. CAFA does not abridge any sovereign power of the attorney general to enforce state law; the only question here is whether there is a federal forum when an attorney general brings claims where a sufficient number of private persons are the real parties in interest. Congress has plenary authority under Article III to create federal jurisdiction so long as there is minimal diversity; federal courts faithfully apply state law under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); Congress has appropriately balanced federalism concerns elsewhere in CAFA; an attorney-general's action is removable only when it alleges (as here) claims of 100 or more persons, in addition to his own claims. This action—brought against out-of-state defendants by private plaintiffs' lawyers retained by the Attorney General and duplicating allegations of private class actions—is exactly the type of mass action Congress

intended to be removed to federal court. This Court should affirm the judgment below.

1. ***Legislative Background.*** In enacting CAFA, Congress found that state courts often have a "bias against out-of-State defendants" and also attempt to "impose their view of the law" on defendants from other states. J.A. 54a. Recognizing that plaintiffs were "keeping cases of national importance out of Federal court," and determined to exercise its full Article III power to authorize diversity jurisdiction, *id.*, Congress relaxed federal jurisdictional requirements for "class actions" and "mass actions."

Before CAFA, it was difficult to remove state-law class actions to federal court. This Court had interpreted the federal diversity-jurisdiction statute to require complete diversity of citizenship, even though Article III only requires minimal diversity between any plaintiff and defendant. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). Plaintiffs' counsel could prevent removal simply by naming at least one in-state or non-diverse class representative, even if most class members and the defendants were citizens of other states. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969). Moreover, claims could not be aggregated to satisfy the amount-in-controversy requirement. *Id.* And the presence of a state plaintiff (a non-diverse party) would destroy complete diversity. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

To protect out-of-state defendants from class-action abuses in state court, CAFA facilitated removal by abolishing the rules that required complete diversity among named representatives and that prohibited aggregation of amounts-in-

controversy. Under CAFA, diversity jurisdiction exists over class actions with more than $5,000,000 in controversy in aggregate if *any* person "named or unnamed" falling "within the definition of the proposed . . . class" is a "citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(1)(D) and (2)(A). Section 1332(d)(2)(C) provides a similar standard where a foreign defendant is involved. State-court class actions meeting the statutory requirements are removable to federal court. *Id.* § 1453. To balance federalism concerns, Congress withheld federal jurisdiction of certain class actions of principally state concern, *id.* § 1332(d)(4) & (5), and gave district courts discretion to decline jurisdiction over certain other actions involving local state issues and parties, *id.* § 1332(d)(3).

Congress also authorized removal of "mass actions," defined as "any civil action (except [a class action]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact," subject to certain exclusions. *Id.* § 1332(d)(11)(B)(i) & (ii). Congress applied the same jurisdictional rules to mass actions as it applied to class actions, including the $5 million amount in controversy and minimal diversity. Section 1332(d)(11)(A) provides that a "mass action shall be *deemed to be a class action* removable" to federal court if it "otherwise meets" the requirements of CAFA class action jurisdiction, as stated in "paragraphs (2) through (10)" of § 1332(d) (emphasis added). Paragraph (2) is the minimal-diversity provision. Thus, "Congress enacted [CAFA] . . . to grant the federal courts a form of minimal diversity jurisdiction over . . . mass actions in which any . . .

mass action member is diverse in citizenship with regard to any defendant . . . ." 13E Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3606 (3d ed. 2011).

During consideration of the bill that became CAFA, forty-six state attorneys general expressed concern that CAFA would allow removal of attorney-general *parens patriae* actions "on behalf of consumers" seeking restitution under state "consumer protection and antitrust statutes." They supported an amendment to CAFA "exempting all actions brought by State Attorneys General from" its provisions. 151 CONG. REC. S1157, 1158-59 (daily ed. Feb. 9, 2005). The Senate decisively rejected such an amendment proposed by Senator Pryor by a 60-39 vote. *Id.* at S1165.

2. ***Factual Background Of Criminal And Civil LCD Price-Fixing Actions.*** This action is one of more than 150 actions that have been filed across the country, asserting the same or similar claims, against the same defendants, based on the same alleged global price-fixing conspiracy in the thin-film transistor, liquid crystal display ("TFT-LCD" or "LCD") industry.

In December 2006, news reports revealed a federal grand jury investigation into the LCD industry. Resp. App. 43a. Some alleged conspirators entered guilty pleas and paid criminal fines. Resp. App. 2a.

As is common upon the revelation of corporate grand-jury investigations, within days the class-action plaintiffs' bar filed dozens of putative class actions against LCD manufacturers. Eventually,

plaintiffs filed more than 150 actions across the country (including more than 100 putative class-actions) seeking treble damages, attorneys' fees, and injunctive relief under the Clayton Act, 15 U.S.C. §§ 15, 26, as well as unjust enrichment and restitution under various state laws.

The DOJ investigation had no particular connection to Mississippi. Defendants sold billions of dollars' worth of LCD panels in international commerce from 1996 through 2006, the relevant period alleged in the complaint. *Id.* at 11a-12a. No defendant is a Mississippi resident: all twenty-two are part of multinational corporate families headquartered in Asia. *Id.* at 3a-10a. The alleged conspiratorial activities occurred mostly in Asia. *Id.* at 23a-24a. None is alleged to have occurred in Mississippi. This action accordingly bears all the hallmarks of the "'interstate cases of national importance'" that CAFA intended to be removable to federal court. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005)). The only connection to Mississippi is that many of its citizens, businesses, and governmental entities purchased products containing LCD panels.

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation centralized all federal LCD actions for coordinated pretrial proceedings in the U.S. District Court for the Northern District of California. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL Docket No. 1827 (N.D. Cal.). The MDL proceeding included all of the various direct- and indirect-purchaser class actions as well as actions by "opt-out" plaintiffs and the attorneys general of

several states. Defendants have settled class actions by private purchasers of products containing LCD panels (including Mississippi purchasers), and obtained full releases of claims as part of those settlements.[1]

3. ***The Attorney General's Complaint.*** In 2011, after the conclusion of the DOJ investigation, the Mississippi Attorney General filed this suit in Mississippi state court against the same group of defendants named in the prior LCD actions. Resp. App. 2a-67a. As is common, private plaintiffs' lawyers represented the Attorney General, and much of the complaint is a carbon copy of the earlier-filed class actions. Indeed, of the 206 paragraphs of allegations in the Attorney General's complaint, 176 are identical or nearly identical to the paragraphs in the consolidated indirect-purchaser class-action complaint filed in the MDL proceeding. *Compare*

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[1] The Attorney General incorrectly states that the "settling defendants" agreed that these settlements do not foreclose non-settling States from asserting *parens patriae* claims on behalf of the same consumers who settled their claims. Br. 7. All defendants contend that the settlements foreclose such claims; no defendant ever stipulated otherwise. The very order the Attorney General cites, *see* Br. 48 n.8, makes clear that three defendants (AUO, LG, and Toshiba) "have not stipulated that their Settlement Agreements would have no preclusive effect on *any* claims brought by a non-Settling State." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *6 (N.D. Cal. Apr. 3, 2013). The remaining defendants agreed only that their settlements with a nationwide injunctive relief class did not bar States from bringing monetary relief claims on behalf of consumers who were not party to a class action settlement of monetary relief claims. *See* MDL Dckt. Nos. 4659 at 4-17 (transcript of preliminary approval hearing); 5730.

Resp. App. 3a-63a at ¶¶ 3-34, 36-37, 40-50, 52-97, 101-43, 145-80, 183-90, 192-94, 196-99, 202 *with* Indirect-Purchaser Pls.' Second Consolidated Am. Compl., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 SI, MDL Docket No. 1827 (N.D. Cal. Dec. 5, 2008), ECF No. 746, ¶¶ 1-2, 7, 10-16, 67-100, 101-85, 187-227, 240-48, 250-53, 285.

The Attorney General has conceded the copycat nature of this action. After defendants removed the case to the U.S. District Court for the Southern District of Mississippi, J.A. 19a, D.E. 1, the Attorney General filed a "Notice of Potential Tag-Along Action," advocating transfer of the action to the federal MDL proceeding:

> This action involves substantially duplicative or overlapping parties and concerns the same wrongful acts and occurrences as those involved in the more than 100 civil actions currently pending in MDL-1827: *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827-SI (N.D. Cal. Filed Apr. 20, 2007).

J.A. 22a; *see also* J.A. 24a.

The Attorney General's complaint asserts two counts, alleging violations of (1) the Mississippi Consumer Protection Act ("MCPA"), Miss. Code Ann. § 75-24-1, et seq., and (2) Mississippi's Antitrust Act ("MAA"), Miss. Code Ann. § 75-21-1, et seq. Resp. App. 2a, 60a–64a (¶¶ 192-206). These two Mississippi statutes are the sole bases for each claim for relief. Resp. App. 2a.

Some of the claims for relief are solely on behalf of the State of Mississippi, including for example, the claim for injunctive relief. Resp. App. 65a. The

claims for restitution, on the other hand, are expressly on behalf not only of the State but also private purchasers of products containing LCD panels. The complaint includes allegations like:

1) Resp. App. 2a (citing need to address "*restitution for consumers or governmental entities which purchased products* at an artificially inflated price. . . . Attorney General . . . brings this action *on behalf* of . . . natural persons residing in the State "); ¶1 (The attorney general brings this suit . . . "*on behalf of Mississippi citizens.*");

2) Resp. App. 3a ¶2 ("[R]elief is sought *on behalf of . . . consumers* . . . who bought a wide range of price-fixed products.");

3) Resp. App. 12a ¶ 42 ("Defendants' conspiracy has resulted in an *adverse monetary effect on indirect-purchasers throughout Mississippi.*");

4) Resp. App. 46a ¶ 145 ("Defendants' conspiracy to raise, fix, or maintain the price of LCD panels at artificial levels *resulted in harm to Plaintiff and other indirect-purchaser consumers in Mississippi* . . . .").

The complaint is replete with other allegations that "*Plaintiff and other Mississippi indirect purchasers* have paid supra-competitive, artificially inflated prices for LCD products[.]"), Resp. App. 61a ¶ 194(f) (emphasis added); *see also id.* 53a ¶ 169, 58a ¶ 182, leading to the Attorney General's request "that defendants be ordered to restitute any and all monies to the State of Mississippi for its purchases of its purchases [sic] of LCD products *and the purchases of its citizens*") (emphases added).

These repeated allegations seeking monetary restitution for both the State and private purchasers in Mississippi rely expressly upon Section 75-24-11 of the MCPA. *See* Resp. App. 65a ¶ 2 (seeking "[i]n accordance with Miss. Code § 75-24-11 that defendants be ordered to restitute any and all monies to the State of Mississippi for its purchases . . . of LCD products and the purchases of its citizens"). Section 75-24-11 of the MCPA provides for:

> restitution, as may be necessary to *restore to any person in interest any monies* . . . which may have been acquired by means of any practice prohibited by this chapter . . . .

Pet. App. 72a (emphasis added). Section 75-24-11 further provides for "the *appointment of a receiver*," who can distribute the appropriate restitution monies to "any person in interest." *Id.* (emphasis added).

The Attorney General's 2011 complaint is not driven by the need for an injunction against conduct that he concedes ended in 2006. Br. 4. Rather, the Attorney General contemplates potentially enormous recovery. His contingency-fee arrangement with private lawyers, for example, provides: "Assume Recovery by the State of Mississippi of a monetary, sum, benefit, or value equal to $600,000,000.00." Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf.

4. ***Removal Proceedings In The District Court.*** Defendants timely removed this action to the U.S. District Court for the Southern District of Mississippi under CAFA as a "mass action" under 28 U.S.C. § 1332(d)(11), and as a "class action" under 28

U.S.C. § 1332(d)(2). Resp. App. 74a. The Attorney General unsuccessfully moved to have this action centralized with the other LCD actions in the MDL proceeding, and filed a motion to remand the action to state court. J.A. 24a-25a.

The district court concluded that the action qualified as a "mass action" under CAFA. Pet. App. 44a. It reasoned that both the MCPA and the MAA give Mississippi consumers a right to sue for their injuries, which made them "real parties in interest with respect to the State's request for restitution on their behalf." Pet. App. 39a. Accordingly, it held that "this suit is a mass action because there are more than 100 real parties in interest that seek a joint trial on common questions of law or fact." Pet. App. 44a-45a. Nevertheless, the court remanded the action on the grounds that it fell within the provision that applies "when all of the claims in the action are asserted on behalf of the general public, 28 U.S.C. § 1332(d)(11)(B)(ii)(III)." *Id.* at 44a-52a.

5. ***Decision Of The Court Of Appeals.*** The Fifth Circuit reversed, upholding removal under CAFA's mass-action provision and holding that the general-public provision does not apply. Pet. App. 1a-12a. The Fifth Circuit concluded that "[a]t its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative," *id.* at 10a, and agreed with the district court that the "real parties in interest in Mississippi's suit are those more than 100 persons who, by substantive law, possess the right sought to be enforced[.]" *Id.* at 5a. Applying a claims-based analysis, rather than a "whole-case" approach, the court held that given the restitution demand, both

"the State (as a purchaser of LCD products) and individual citizens who purchased the products within Mississippi possess 'rights to be enforced,'" and thus "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 5a-6a. It noted that "it is undisputed" that the relief sought "satisfies the amount in controversy requirement," *id.* at 4a, and that "there are more than 100 consumers." *Id.* at 9a.

While agreeing with the district court that this case is a mass action, the Fifth Circuit parted company as to CAFA's general-public provision. That provision does not apply because the "requirement that 'all of the claims' be asserted on behalf of the public is not met here." *Id.* at 9a. "[I]ndividual consumers . . . are real parties in interest." *Id.* Therefore, the Fifth Circuit upheld federal jurisdiction and removal to federal court.

SUMMARY OF ARGUMENT

CAFA authorizes removal to federal court of a "mass action" on the same terms as qualifying class actions. It defines a "mass action" as any civil action, other than a class action, "*in which* monetary relief *claims* of 100 or more *persons* are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

Thus, as a matter of plain language, a federal court applying that definition must determine whether any "monetary relief claims" "in" the action belong to "100 or more persons." Contrary to the Attorney General's contentions, determination of a mass action does not turn on the character of the

action as a whole. Rather, the district court must undertake a claims-based analysis. Other provisions of the statute, including enumerated exclusions from the mass-action definition, likewise turn on the analysis of claims.

Similarly, the plain language requiring a determination of the "persons" to whom the "monetary relief claims" belong necessarily requires a determination of the real parties in the interest to the claim. That is the longstanding rule in over a century of this Court's jurisprudence under the diversity statute, and Congress is presumed to legislate in light of those precedents. The Attorney General insists that this Court should discard that jurisprudence and interpret "persons" to mean "named plaintiffs." But Congress did not use the term "named plaintiffs" in CAFA's "mass action" definition. Indeed, the minimal-diversity provision that applies to mass actions makes plain that jurisdiction over mass actions is determined on the basis of both named and unnamed plaintiffs. Congress has used the term "named plaintiffs" in other jurisdictional statutes, and did not do so here. The Attorney General argues that the term "plaintiffs" in other mass-action provisions of CAFA must refer to named plaintiffs, but regardless that does not trump the plain meaning of the different term "persons."

Despite the explicit directive in CAFA that courts undertake a claims-based analysis, the Attorney General insists that the appropriate test derived from this Court's sovereign immunity precedents requires analysis of the "essential nature of the proceeding." The Attorney General wrenches that phrase out of

context, and ignores that this Court has expressly held that in multi-claim actions, the state's status as a real party in interest must be determined for each claim, and not on the basis of the case as a whole. Pre-CAFA appellate authorities have used the sovereign-immunity test in determining "complete diversity," which does not require a claims-based analysis. But CAFA replaces the complete-diversity rule with a minimal-diversity rule, and explicitly requires claim-based analysis in determining mass-actions.

Here, the thousands of Mississippi persons allegedly injured by paying excessive prices are the real parties in interest to the Attorney General's private-purchaser restitution claims. Indeed, this Court has recognized in an analogous federal context that injured purchasers are the real parties in interest when the government requests restitutionary relief. The Attorney General baldly claims that Mississippi has a contrary rule permitting restitution for consumer payments to be paid to the State, and not to the injured persons, and that the Court cannot pierce the pleadings to question its claim. To the contrary, this Court has always conducted an independent analysis of the state law creating the right of action in assessing diversity requirements. Here, the Mississippi consumer-protection statute only authorizes a court to "restore to any person in interest any monies" unlawfully acquired by the defendant from them; only the consumer making the overpayment is the "person in interest" to whom moneys can be "restore[d]." The Fifth Circuit properly so held, in a construction of state law entitled to deference, as

have other state supreme courts interpreting language from the same uniform act.

None of the Attorney General's other arguments has force. The strict-construction principle recognized in some of this Court's precedents was expressly predicated on congressional *policy* in successive past jurisdiction and removal statutes; they do not apply to CAFA, which abandoned that policy in dramatically broadening diversity jurisdiction and removal of class and mass actions. The Attorney General's invocation of *parens patriae* standing is of no moment. The common-law *parens patriae* standing doctrine has no application here. Nor does CAFA include any implied exemption of any statutory *parens patriae* actions that are effectively representative actions. In the mass-action definition, Congress consciously mimicked the language of those statutes, which authorize attorneys general to assert "monetary relief claims" on behalf of natural "persons"; they are plainly within CAFA's reach. Likewise, the provision excluding from the mass-action definition actions where "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" does not aid the Attorney General. It is not surplusage because it clarifies the scope of the mass-action definition, and because some mass actions may indeed fall within its scope. In any event, the Attorney General cannot shelter under this provision because he does not assert exclusively general-public claims.

Nor does CAFA, properly interpreted, raise federalism concerns. Congress unquestionably has the Article III power to authorize removal of state

attorney general "mass actions"; CAFA does not abridge any sovereign or quasi-sovereign interest of a State, or any substantive right to enforce state laws. This is only a question of forum, and federal courts faithfully enforce state law. Through CAFA, Congress sought to limit biases and abuses in state court, largely instigated by the same plaintiffs' bar that brings class actions and attorney-general actions under contingency fee arrangements.

Finally, the legislative history does not avail the Attorney General. To support his "named plaintiffs" theory, the Attorney General invokes a Senate report that was issued *after* CAFA's enactment, which courts have rightly deemed irrelevant. The defeat of an amendment to exempt state attorney-general actions hardly establishes that such actions were already exempt; even if some Members thought so, many others opposed the amendment because it would create a loophole for the plaintiffs' bar to exploit. Nothing in the legislative history trumps the plain meaning of the mass-action provision, and this Court should affirm the judgment below.

ARGUMENT

I. The Attorney General's Action Is One "In Which Monetary Relief Claims Of 100 Or More Persons Are Proposed To Be Tried Jointly."

A. Every Sentence Of CAFA's "Mass Action" Definition Requires Analyzing The "Claims" Within The Action.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," and "must presume that a legislature says in a

statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). CAFA defines a "mass action" as "any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief *claims* of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' *claims* involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose *claims* in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

It could not be plainer that the mass-action definition requires analysis of the "claims" within an action rather than the "whole case." Every clause refers to "claims," starting with the determination of whether the civil action is one "*in which* monetary relief *claims* of 100 or more persons are proposed to be tried jointly. . . ." 28 U.S.C. § 1332(d)(11)(B) (emphasis added). A court must analyze the complaint to determine whether the requisite type of claims ("monetary relief claims") exist on behalf of the requisite number and type of claimants ("100 or more persons"). Under the plain language, the existence of other claims is irrelevant as long as the action includes "monetary relief claims of 100 or more persons." The remainder of the mass-action definition likewise requires the court to determine whether the requisite claims "are proposed to be tried jointly" and "involve common questions of law or fact." *Id.*

The four provisions in the next subsection, 1332(d)(11)(B)(ii)(I)-(IV), confirm the necessity of a

claims-based approach, providing that a mass action "shall not include any civil action in which—

> (I) all of the *claims* in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;
>
> (II) the *claims* are joined upon motion of a defendant;
>
> (III) all of the *claims* in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> (IV) the *claims* have been consolidated or coordinated solely for pretrial proceedings."

(emphases added). Indeed, the first provision of subsection (B)(ii)—which excludes actions in which "*all of the claims in the action* arise from an event or occurrence in the State in which the action was filed" (emphasis added)—demonstrates that Congress knows precisely how to put the character of a "whole case" at issue when it so intends. CAFA clearly calls for a claim-based analysis of whether the mass-action definition is satisfied.

B. The Mass-Action Requirement Of "Monetary Relief Claims Of 100 Or More *Persons*" Looks To The Real Parties In Interest To The Claims.

The CAFA mass-action requirement that the action include "monetary relief claims of 100 or more persons" is not based, as the Attorney General

contends (Br. 16-17), solely on the number of named plaintiffs. Rather, the statute by its plain text—referring to the "claims of 100 or more *persons*"—addresses the persons to whom the claim belongs, *i.e.*, the real parties in interest *to the claims* (the persons entitled to the "monetary relief"). 28 U.S.C. § 1332(d)(11)(B)(i). This comports with the settled diversity-jurisdiction rule that "[f]or purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party," and "*the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought*[.]" *Stewart v. Baltimore & Ohio R.R. Co.*, 168 U.S. 445, 449-50 (1897) (emphasis added); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy"); *see also Ex parte Nebraska*, 209 U.S. 436, 445 (1908) ("If the nature of the case is such that the State of Nebraska is the real party plaintiff, the Federal court will so decide for all purposes of jurisdiction, *even though the State were not named as a party plaintiff.*") (emphasis added); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59-60 (1901) (conducting a diversity analysis and declaring that a state is a real party in interest regarding a claim if the relief "inures" to the state, and rejecting the idea that "a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders . . . , and in securing compliance with all its laws" is sufficient to make a State a real party in interest to a claim). *Cf. United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents. . . .").

Notwithstanding this plain meaning, the Attorney General (Br. 16-17) contends that Congress meant to say "claims of 100 or more named plaintiffs" when it used the phrase "claims of 100 or more *persons*," pointing to the use of the term "plaintiffs" elsewhere in the mass-action definition. Br. 16-17. But Congress did not use the term "named plaintiffs," even though it knows how to do so. The Magnuson Moss Act's jurisdictional provision, for example, permits a class action to be brought in federal court, unless, among other things, "the number of *named plaintiffs* is less than one hundred." 15 U.S.C. § 2310(d)(3)(C) (emphasis added).[2]

CAFA's minimal-diversity provisions confirm the plain meaning of "persons" by providing that *unnamed* persons may satisfy the minimal-diversity requirement for class or mass actions. Minimal diversity is satisfied when "any member of a class of *plaintiffs*" is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2) (emphasis added). "Class members" under CAFA means the "persons (*named or unnamed*) who fall within the definition of the proposed or certified class in a class action." *Id.*

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[2] This Court's own opinions, which repeatedly use "plaintiff" to refer to unnamed class members, undermine the Attorney General's contention that "plaintiffs" refers only to "named plaintiffs." *See, e.g.*, *Exxon Mobil Corp. v. Allapattah*, 545 U.S. 546, 549 (2005) (where "at least one *named plaintiff* in the action satisfies the amount-in controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of *other plaintiffs* in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount") (emphasis added); *Zahn v. Int'l Paper Co.* 414 U.S. 291, 297-99 (1973) (describing a class action as being "brought on behalf of *plaintiffs* with separate and distinct claims") (emphasis added).

§ 1332(d)(1)(D) (emphasis added). This minimal-diversity requirement applies to mass actions, which are deemed class actions under CAFA if they otherwise meet the requirements of § 1332(d)(2)-(10). *See id.* § 1332(d)(11)(A). Because minimal diversity can be satisfied by unnamed persons whose claims are joined in a mass action, the State's proposed construction of "persons" in the mass action definition as referring only to named plaintiffs is untenable.

CAFA's "general public" provision also demonstrates Congress's intent that a mass action may consist of claims brought on behalf of unnamed persons. This provision provides that a "mass action" shall not include an action in which "all of the claims in the action are asserted on behalf of the general public (*and not on behalf of individual claimants or members of a purported class*) . . . ." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). Thus, a "mass action" expressly may include representative "claims . . . on behalf of individual claimants or members of a purported class." *See also, e.g.*, Enrique Schaerer, *A Rose By Any Other Name: Why A Parens Patriae Action Can Be A "Mass Action" Under the Class Action Fairness Act*, 16 N.Y.U. J. PUB. POL'Y 39, 61 (2013) (observing that the "general public" provision's reference to "'members of a purported class' makes sense only if non-class, representative actions fall within the scope of a CAFA mass action").

Accordingly, CAFA by its plain text requires that a removing defendant invoking mass-action jurisdiction must (1) identify at least one real party in interest (named or unnamed) who is diverse from any one defendant, and (2) show that the action

includes claims of "100 or more persons," *i.e.*, 100 or more real parties in interest. The presence of a State party can no longer destroy diversity, *see supra* 3, nor is it material that the State may have asserted its own claims in the same action. The action is removable so long as it is one "in which" claims of 100 or more persons are proposed to be tried jointly. 28 U.S.C. § 1332(d)(11)(B)(i).

1. The meaning of "persons" does not depend on the meaning of "plaintiffs" in CAFA's mass action provisions.

The Attorney General seeks to avoid the plain meaning of "persons" in CAFA's mass-action definition by focusing on Congress's employment of the separate term "plaintiffs" in CAFA's mass-action provisions. Specifically, section 1332(d)(11)(B)(i) includes a requirement that the claims in the action be proposed for joint trial "on the ground that the plaintiffs' claims involve common questions of law or fact," and also provides that, once a mass action is removed, CAFA diversity "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection [1332](a)" of at least $75,000. 28 U.S.C. § 1332(a), (d)(11)(B)(i). In addition, CAFA's MDL transfer provision provides that, once removed, a "mass action" may not be transferred under the multidistrict litigation procedures of 28 U.S.C. § 1407 "unless a majority of the plaintiffs in the action request transfer. . . ." *Id.* 1332(d)(11)(C)(i). The Attorney General contends that Congress's usage of the term "plaintiffs" in these provisions compels a

construction of "persons" to mean "named plaintiffs." Br. 16-18, 21-24. His arguments fail.

As demonstrated *supra*, it is clear that "persons" means real parties in interest in section 1332(d)(11)(B)(i), and that the term "plaintiffs" in 1332(d)(2)'s minimal-diversity language as applied to mass actions must include unnamed real parties in interest. However, it is not inexorable that a word has the same meaning everywhere in the statute, and meaning will depend on context. *Envt'l. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Thus, even though the term "plaintiffs" in CAFA's minimal-diversity provision, § 1332(d)(2), necessarily applies to unnamed plaintiffs, in the different context of the transfer provision, 1332(d)(11)(C)(i) (a procedural provision), the term "plaintiffs" is best construed to refer to the actually appearing party who is prosecuting an action, whether on his own behalf or on behalf of a represented party.

The meaning of the term "plaintiffs" in section 1332(d)(11)(B)(i) likewise depends on context. But that is immaterial to the question before the Court. Regardless of how the term "plaintiffs" is construed, its meaning cannot alter the plain meaning of "persons" as real parties in interest. The Attorney General's proposal that "persons" always means "named plaintiffs" would discard over a century of this Court's jurisprudence determining the "person" to whom "claims" belong as the real parties in interest and cannot be adopted.

Either construction of the term "plaintiffs" harmonizes with the plain meaning of "persons" as the real parties in interest. CAFA's mass-action definition can be read naturally to give "persons" and

"plaintiffs" distinct meanings. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). The word "persons" in the phrase "monetary relief claims of 100 or more persons" can be read naturally to mean the individuals or business entities to whom such claims belong, while "plaintiffs" can be read naturally as referring to the party or parties bringing an action.

On the other hand, if "persons" and "plaintiffs" should have the same meaning in 1332(d)(11)(B)(i)'s "mass action" definition, that would not justify abandoning the plain meaning of "persons" under the historic real-party-in-interest test. The proper approach would be to construe the term "plaintiffs" as including both named and unnamed real parties in interest. *Cf. Title Guar. & Surety Co. v. Allen*, 240 U.S. 136, 140-41 (1916) (holding under prior diversity statute that, if the state is a nominal plaintiff, the represented individuals must each meet jurisdictional amount in controversy); *Hickman*, 183 U.S. at 59-60 (referring to "real party plaintiff").

Either interpretation avoids the administrative issues the Attorney General fears. If the $75,000 amount-in-controversy clause applies only to named plaintiffs, and "persons" continues to mean real parties in interest, the feared administrative tasks disappear because CAFA mass-action jurisdiction extends to claims of unnamed real parties in interest in a mass action as long as one named plaintiff representing them has a claim exceeding $75,000.

If "plaintiffs" includes both named and unnamed plaintiffs, the $75,000 amount-in-controversy clause

is readily administrable. In some circumstances, defendants may be able to identify from their payment records any persons who may have claims for overpayments and prove the requisite amount in controversy even for unnamed parties. But so long as defendants can prove that at least one person satisfies the $75,000 threshold—and here there are many—then unnamed plaintiffs with insufficient claims may remain in federal court under supplemental jurisdiction under § 1367(a), just as unnamed class members do under the holding of *Allapattah*. *See* 545 U.S. at 559 ("If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a)[.]"). There would be no need, as the Attorney General suggests, Br. 22, "for a trial court to examine the circumstances of each consumer in a State, to ensure that each one meets the federal amount-in-controversy threshold[.]"[3]

This Court need not resolve the proper operation of the $75,000 amount-in-controversy clause, because it does not concern the removability of the "action" (and the Attorney General does not contend

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[3] Even if supplemental jurisdiction were not available, any remands based on the $75,000 clause would not jeopardize satisfaction of the numerosity requirement of "monetary relief claims of 100 or more persons" or the $5,000,000 amount-in-controversy requirement because "[f]or jurisdictional purposes, our inquiry is limited to examining the case as of the time it was filed in state court[.]" *Standard Fire*, 133 S. Ct. at 1349 (internal quotation marks omitted). Otherwise, a "mass action" would have a $7,500,000 amount-in-controversy requirement (100 x $75,000) rather than the $5,000,000 requirement set by Congress. *See* 28 U.S.C. §§ 1332(d)(2) – (d)(11)(A).

otherwise, *see* Br. 21-23). This clause concerns the potential disposition, post-removal, for any "plaintiffs whose claims in a mass action" do not exceed $75,000. The Fifth Circuit accordingly did not reach that question. The salient point is that the Attorney General's belt-and-suspenders approach to statutory construction is untenable: the meaning of "plaintiffs" in CAFA does not alter the plain meaning of "persons" as referring to real parties in interest.

2. The Attorney General's complaint proposes to try jointly the monetary relief claims of more than 100 persons.

Nor can the Attorney General change the nature of the jurisdictional inquiry by baldy claiming that only his claims would be tried. Br. 19-20. As noted above, the Attorney General seeks restitution for numerous persons in Mississippi. Resp. App. 65a ¶ 3. By seeking to resolve those claims in this action, the State has already "proposed" that the "monetary relief claims" of more than 100 persons be tried along with the State's. The State offers no explanation of how those claims could be resolved but in a joint trial. There is only one complaint. The State's claims are supported by the same allegations of law and fact that support the individual claims. And the Attorney General has acknowledged common questions: "[T]his action involves substantially duplicative or overlapping parties and concerns the same wrongful acts and occurrences as those involved in the more than 100 civil actions currently pending in MDL-1827." J.A. 22a, D.E. 10, Ex. 1; *see also* J.A. 24a, D.E. 18 ("There is no dispute that the State's action includes the common facts presented in the MDL.").

This action is similar to a class action where liability for consumer overpayments would be tried jointly and individual issues of relief would be tried in a second phase.

3. Nothing in CAFA supports a novel inquiry into a putative real party in interest in "the whole case."

To escape the plain meaning of the statute, the Attorney General, and the courts of appeals in his camp, have invented (with no textual basis in CAFA) a novel concept that the real party in interest in a CAFA action is determined based on "the whole case," rather than by analysis of individual claims. The Seventh Circuit initiated this error, seizing on language in this Court's sovereign immunity precedents that "[w]hether a state is *the* real party in interest in a suit 'is a question to be determined from the "*essential nature and effect of the proceeding.*"'" *LG Display Co. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011) (quoting *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981) (quoting *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945)). Other courts of appeals followed suit:

> We are therefore satisfied to resolve [this case] by adopting the whole-case approach and rejecting the claim-by-claim approach. In so doing, we conclude that *the nature and effect of these actions* demonstrate that South Carolina is *the* real party in interest, a fact that is unencumbered by the restitution claims. We therefore agree with the Ninth and Seventh Circuits that a claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State's

> quasi-sovereign interest in enforcing its own laws, nor *the nature and effect of the proceedings*. . . .

AU Optronics v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012) (emphasis added); *Nevada v. Bank of Am.*, 672 F.3d 661, 670 (9th Cir. 2012).

As an initial matter, even if these circuits were correct that this Court's sovereign-immunity jurisprudence employed a whole-case approach, that would not trump CAFA's explicit directive to undertake a claims-based analysis: *i.e.*, to determine whether the "claims" belong to "100 or more persons." 28 U.S.C. § 1332(d)(11)(B)(i). A determination of whether a person is a real party in interest to a claim under CAFA's minimal-diversity and mass-action provisions is a different inquiry from whether the state is the real party *defendant* in a suit against state officers.

The "whole case" circuits' fixation on "the nature and effect of the action," and their elevation of that consideration above CAFA's textual mandate to analyze the claims within an action, stem from their *misreliance* on this Court's state sovereign-immunity precedents, in particular *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459 (1945). The question in *Ford* was whether the plaintiff could sue in federal court for a state tax refund when naming only state officials, rather than the State, as defendants. This Court held: "[T]he nature of a suit as one against the state is to be determined by *the essential nature and effect of the proceeding*. And when the action is in essence one for the recovery of money from the state, the state is *the* real, substantial party in interest and is entitled to invoke

its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464 (emphasis added).

Significantly, *Ford* involved a single claim. In sovereign-immunity cases involving multiple claims, the rule is that "[a] federal court must examine *each claim* in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U. S. 89, 121 (1984) (emphasis added). In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 390 (1998), this Court affirmed that real-party-in-interest analysis applied "to each claim rather than [the] case as [a] whole," *id.* at 390, and held in a removal case that even though the Eleventh Amendment barred jurisdiction over one claim, the federal court could proceed with "the remaining claims in the case before us," *id.* at 392-93. And in *Papasan v. Allain*, 478 U.S. 265 (1986), this Court held that "trust claims" against state officers for monetary relief were barred, but a claim for an injunction to redress a constitutional violation was not. *Id.* at 279-80. Thus, a court will evaluate claims against state officers based on "'the essential nature and effect of the proceeding, as it appears from the entire record,'" *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997), but the inquiry still proceeds claim by claim. This Court's sovereign-immunity jurisprudence refutes the "whole-case" approach.

The Seventh Circuit in *Madigan* first took a wrong turn in importing *Ford*'s analysis into CAFA's mass-action removal analysis. The earlier Seventh Circuit case on which *Madigan* relied, *Nuclear Engineering*, properly relied on *Ford* to determine

whether a State was "a" real defendant in interest to test *complete diversity*: "States are not considered 'citizens' for purposes of diversity jurisdiction and therefore diversity jurisdiction may not be asserted over an action to which a state is *a* real party in interest. When a state official is a party to a proceeding over which diversity jurisdiction is alleged, whether the respective state is itself *the* real party in interest is a question to be determined from the '*essential nature and effect of the proceeding.*" 660 F.2d at 250 (quoting *Ford*, 323 U.S. at 464) (emphasis added).

Looking to the "essential nature and effect of the proceeding" for whether a State is "a" real party in interest to test *complete diversity* cannot be the appropriate analysis for the minimal-diversity or the "monetary relief claims of 100 or more persons" requirements under CAFA's mass-action provision. "In contrast to the [complete] diversity requirement, most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed *claim by claim*." *Allapattah*, 545 U.S. at 554 (emphasis added).

Like the other jurisdictional tests described in *Allapattah*, CAFA's mass-action provision requires a claim-by-claim analysis, considering the real parties in interest for each claim. CAFA's purpose was to abrogate the complete diversity rule in favor of minimal diversity. Furthermore, as to States, and their special, diversity-destroying status under the complete diversity rule, Congress necessarily acknowledged that CAFA's new class-action and mass-action provisions meant that the State's

presence, either as a real party in interest or a named party, would *not* preclude minimal diversity because Congress expressly excluded from removal any class or mass action in which "the *primary defendants* are States, State officials, or other governmental entities . . . ." 28 U.S.C. § 1332(d)(5)(A) (emphasis added). Congress provided no such exclusion for actions in which a State is a plaintiff, primary or otherwise.

Thus, there is no warrant in CAFA or this Court's jurisprudence for a "whole case" approach. When Congress wanted the removability of a purported "mass action" to hinge on the character of the action *in toto*, as opposed to specific claims, Congress twice used plain language, "all of the claims in the action," 28 U.S.C. §§ 1332(d)(11)(B)(ii)(I)-(III), in provisions that do not apply here. *Supra* 17-18. But to determine whether an action consists of "monetary relief claims of 100 or more persons," a federal court must determine the real parties in interest to the specific claims.

4. The injured persons are real parties in interest to restitution claims asserted by the State based on their alleged overpayments.

There is no question that the injured persons who allegedly paid excessive prices because of unlawful conduct are the real parties in interest to claims for restitution of those overcharges. In an analogous federal-law context, this Court held that even where a government officer brings an action for restitution in equity, the individuals harmed by overcharges are real parties in interest. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 401 (1946). In *Porter*, this Court

upheld the power of the Price Administrator (*i.e.*, the Government) under the Emergency Price Control Act to seek restitution in equity for overcharges to individual tenants as ancillary to his statutory authority to seek injunctive relief. The Court held that:

> [The District Court] may act so as to adjust and reconcile competing claims and so as to accord *full justice to all the real parties in interest*; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced.

Id. at 398. Thus, a restitution claim for overpayment belongs to the person injured by the overcharge as the real party in interest, even if the individual is not the one asserting his or her own claim.

Notwithstanding *Porter*, the Attorney General avers that the federal courts must accept his characterization of the state-law restitution claim in the complaint as belonging to the State and not the injured parties. Br. 53-54. The Attorney General's argument is unsound.

First, a plaintiff's characterization of state law and of the real parties in interest in its pleadings is never dispositive in diversity-jurisdiction cases. The fact that the State is the only named plaintiff does not end the inquiry. The Court will "look beyond the pleadings" to discover the real parties to the controversy because "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are

defendants." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). Moreover, this Court will independently "look to state law to determine the nature and extent of the right to be enforced in a diversity case." *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-53 (1961).

Second, the Attorney General's *authority* is not in question before this Court. Defendants have assumed, for purposes of this appeal only, that the Attorney General has the authority to bring MCPA claims for restitution. The only issue is a jurisdictional one, asking whether 100 or more persons are real parties in interest to those claims.

Third, the Attorney General has twisted the words in the complaint, "restitution to the State," into a basis for arguing that these claims are only on behalf of the State. Br. 54. The Attorney General cannot change the complaint's plain language, which seeks restitution under the MCPA based on the purchases of Mississippi citizens and "on behalf" of them. Resp. App. 65a.

Fourth, as the Fifth Circuit held, under Mississippi law, the individual purchasers are the real parties in interest for the restitution claims for their overpayments. Pet. App. 8a-9a. The Attorney General asserts a variety of claims in this case. Resp. App. 64a-66a. One claim is under Section 75-24-11 of the MCPA for restitution based on the State's "purchases of LCD products and the purchases of its citizens." *Id.* at 65a. Thus, the Attorney General seeks restitution for both the State's purchases *and* the purchases by individual Mississippi consumers. The Fifth Circuit correctly interpreted Mississippi law by holding that "the real parties in interest are

both the State and consumers." Pet. App. 7a. The Court generally defers to the courts of appeals' interpretation of state law within their circuits. *See McMillian v. Monroe County*, 520 U.S. 781, 787 (1997); *Pembaur v. Cincinnati*, 475 U.S. 469, 485 n.13 (1986).

The plain language of Section 75-24-11 of the MCPA supports the Fifth Circuit's holding that consumers are real parties in interest for restitution claims based on their overpayments. Section 75-24-11 only permits the court to order "restitution . . . to *restore* [money] to any person in interest[.]" Pet. App. 72a (emphasis added). The only "person in interest" to whom money can be restored is a consumer who allegedly overpaid for LCD-panel products. Section 75-24-13 makes clear that a consumer "may participate . . . in the distribution of the assets to the extent he has sustained out-of-pocket losses." *Id.* at 73a. Moreover, the restitution claims must belong to the individual consumers because the MCPA allows any consumer to bring a separate action for violations of the MCPA, Pet. App. 73a, and Mississippi does not allow double recovery for the same harm. *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 711 (Miss. 2005) ("double recovery for the same harm is not permissible").

Section 75-24-11 tracks the language of the 1970 Uniform Consumer Protection Act (UCPA) prepared by the Council of State Governments, and Mississippi state courts will construe the MCPA consistent with the practice in other states. *See, e.g., Cole v. Nat'l Life Ins. Co.*, 549 So. 2d 1301, 1306, 1308 (Miss. 1989). The Supreme Court of Arizona has interpreted the "restore to any person in interest"

language of the UCPA not to authorize the court to disgorge consumer overpayments to the State. *State ex rel. Horne v. AutoZone, Inc.*, 275 P.3d 1278, 1282-83 (Ariz. 2012). So did the Supreme Court of Iowa under its then-existing UCPA statute. *State ex rel. Miller v. Santa Rosa Sales and Mktg., Inc.*, 475 N.W. 2d 210, 213 (Iowa 1991) ("This statutory language authorizes the attorney general to recover restitution for Iowa consumers. However, there is no language in section 714.16 which gives authority to award unclaimed restitution funds to the state.").

Thus, while injured consumers may not be parties for procedural or discovery purposes, restitution orders in attorney-general actions entail resolution of "consumer claims" to money unlawfully acquired by the defendant. *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 126 (Idaho 1980); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 423, 438 (Wash. 1976); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 416 (Alaska 1982) ("as to the restitution claim the State is attempting to enforce the rights of a class of private individuals," and "must be regarded as acting in a representative capacity"); *Kugler v. Romain*, 279 A.2d 640, 649 (N.J. 1971) (attorney general's restitution claims were "in the nature of a class action"); *see generally* Mary Dee Pridgen, *Consumer Protection and the Law* §§ 7-13 to 7-14 (Nov. 2012). Injured purchasers are the "person in interest" to whom money must be "restored" under the MCPA, and thus are the real parties in interest under CAFA.

It does not matter that the Attorney General has asserted claims for injunctive relief and civil penalties, and proprietary claims for restitution of

the State's own overpayments. The Attorney General has also asserted restitution claims for overpayments that belong to consumers numbering in the thousands, at a minimum, and thus this is a removable mass action "*in which* monetary relief *claims* of 100 or more *persons* are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

II. The Attorney General's Arguments In Derogation Of The Plain Meaning Of The CAFA Mass-Action Statute Are Unavailing.

The Attorney General advances an array of counterarguments, but none overcomes the plain language of the CAFA mass-action statute.

A. No Canon Of Strict Construction Applies To CAFA.

The Attorney General claims that CAFA is subject to a rule of strict construction sometimes applied to removal statutes, citing principally *Healy v. Ratta*, 292 U.S. 263 (1934), *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), and *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002). *See* Br. 27-28. Those cases make clear that strict construction was a judicial gloss on restrictive *congressional* policy of past jurisdictional and removal statutes; those cases have no application to CAFA, which adopts a contrary policy of expanding federal diversity jurisdiction over (and removal of) class and mass actions.

Healy was a federal-question case involving no question of removal. The Court stated that "[d]ue regard for the rightful independence of state

governments" required confining jurisdiction to the precise limits of the statute, 292 U.S. at 270, but it announced no general, constitutionally-based policy of strict construction. Rather, this Court stated that "[t]he *policy of the statute* calls for its strict construction." *Id.* (emphasis added). The Court recounted that "[f]rom the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount," and "[p]ursuant *to this policy* the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount." *Id.* at 268-69 (emphasis added). Thus, the *Healy* rule of strict construction is derived from the policy of prior jurisdictional statutes (which Congress is free to abandon).

This Court applied *Healy's* policy-based canon of strict construction to the diversity-jurisdiction statute in *Snyder v. Harris*, 394 U.S. 332 (1969). In affirming the rule against aggregation of class-action claims in determining the amount in controversy, this Court noted that "the congressional purpose in steadily increasing through the years the jurisdictional amount requirement" served "to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction." *Id.* at 339-40.

In *Shamrock*, this Court invoked *Healy* in the removal context, likewise reasoning that "the *policy of the successive acts of Congress* regulating the jurisdiction of federal courts is one calling for the

strict construction of such legislation." 313 U.S. at 109 (emphasis added). The Court noted that, after extending the right of removal to any party in 1875, Congress returned to its earlier rule of limiting the right of removal to defendants in 1887. *Id.* at 105-06. This Court declared this history to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal." *Id.* at 108. *See also Syngenta*, 537 U.S. at 32 (applying same canon to same statute).

No such policy-based canon of strict construction applies to CAFA. CAFA radically reshaped the landscape of diversity jurisdiction and removal, embodying a new congressional policy "to move as many class and mass actions as possible into the federal courts." 13F Wright and Miller, *Federal Practice and Procedure* § 3623, at 27 (3d. ed. 2013). In CAFA, Congress expressly sought to cure "[a]buses in class actions [that] undermine the national judicial system," and to enable removal of class and mass actions from state courts that often "demonstrate bias against out-of-State defendants[.]" J.A. 53a-54a. Far from *limiting* diversity jurisdiction over class and mass actions, as past statutes did, Congress took numerous measures in CAFA to *expand* it. For class and mass actions, it abrogated the rule of complete diversity in favor of minimal diversity, 28 U.S.C. § 1332(d)(2)(A)-(C); abandoned the rule against aggregation of amounts in controversy, *id.* § 1332(d)(6); and allowed even unnamed members of a class or mass action to count for purposes of diversity of citizenship and amount in controversy, *id.* § 1332(d)(1)(D).

Congress also returned to "the concept of diversity jurisdiction as intended by the framers of the United States Constitution." J.A. 53a-54a. "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Diversity jurisdiction in the federal courts is premised upon this apprehension of state prejudice against out-of-state parties. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.); *see also Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Allapattah*, 545 U.S. at 553-54. Congress determined that expanding removability to federal court was necessary to counteract state court biases in class and mass actions. "[O]nly in the federal courts is an out-of-state litigant always afforded the best available pleading practices and pre-trial and trial procedures, a judge free of the pressures of re-election or reappointment, and a jury without parochial attachment to a single county or municipality." James W. Moore and Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 22 (1964).

The Attorney General incorrectly asserts that *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), applied the canon of strict construction in a post-CAFA case, but that case only addressed the burden of proving jurisdictional facts: "The burden of persuasion for establishing jurisdiction, of course, remains on the party asserting it. When challenged on *allegations of jurisdictional facts*, the parties must support their

allegations by competent proof." *Id.* at 96-97 (emphasis added).[4]

Whatever Congress's past policies, there is no policy of restricting federal court jurisdiction in CAFA that warrants strict construction of its class- and mass-action provisions. As this Court declared in *Allapattah*,

> We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. Ordinary principles of statutory construction apply.

545 U.S. 546, 558 (2005). Indeed, to the extent that this Court finds any provision of CAFA to be ambiguous, the proper canon to invoke is the principle that when "the Act is remedial, it is to be construed broadly to effectuate its purposes." *Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 159 (1983).

The Attorney General's invocation of policy-based canons strictly construing removal statutes is

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[4] Other cases cited by the Attorney General are similarly inapposite. *Holmes Group v. Vornado Air*, 535 U.S. 826 (2002), was not a removal case; the Court merely held that a patent-law counterclaim filed in federal court cannot confer "arising under" patent jurisdiction. *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804 (1986), likewise did not address diversity jurisdiction.

particularly inapposite. CAFA not only dramatically expanded the scope of class and mass actions removable in 28 U.S.C. § 1453, exempting them from four procedural rules that apply to removal generally. **First**, CAFA removal is not subject to the typical one-year limitation period on removal. 28 U.S.C. § 1453(b). **Second**, CAFA removal does not require the consent of all defendants. *Compare id.* § 1446(b)(2)(A) *with id.* § 1453(b). **Third**, under CAFA, even a defendant who is a citizen of the state in which the action was filed may remove the action to federal court. *Compare id.* § 1441(b)(2) *with id.* § 1453(b). **Fourth**, in cases removed to federal court under CAFA, unlike ordinary removal cases, orders of remand to state court are appealable. *Compare id.* § 1447(d) *with id.* § 1453(c)(1). CAFA expressly applied each of these four changes to removal of both class actions and mass actions. 28 U.S.C. § 1332(d)(11)(A) ("For purposes of this subsection *and section 1453*, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10)."). These changes to the normal removal procedure underscore Congress's intention to facilitate and encourage removal under CAFA.

Finally, even outside of CAFA, the *Shamrock* policy-based canon of strict construction of removal statutes has little current vitality. In *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), interpreting 28 U.S.C. § 1441, this Court stated that "whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id.* at 697. *See also* 16 James W. Moore, *Moore's Federal Practice*, § 107.5 (2013) ("[r]ecent developments have cast some doubt on the axioms that removal is

strictly construed and that a presumption exists against removal").

B. Neither Common-Law *Parens Patriae* Nor Statutory "*Parens Patriae*" Is At Issue Here.

1. The common-law *parens patriae* is a federal-court standing doctrine unrelated to CAFA's "mass action" definition.

Despite the lack of textual support, the Attorney General argues that CAFA categorically exempts "*parens patriae*" or state attorneys general actions. *E.g.*, Br. 3. "*Parens patriae*" is a standing doctrine. It is not, as the Attorney General asserts, a type of claim or cause of action. Br. 7, 19, 50. Labeling an action "*parens patriae*" says nothing about whether the action includes "monetary relief claims of 100 or more persons."

The American common-law *parens patriae* standing doctrine developed primarily through this Court's original-jurisdiction cases, in which jurisdiction hinged on whether the State had standing as a real party in interest. *See Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602-04 (1982); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Under this doctrine, "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Id.* at 665. A quasi-sovereign interest is one involving the welfare of its residents in general or the State's place in the federal system, and must involve assertion of "an interest apart from the

interests of particular private parties." *Snapp*, 458 U.S. at 607.

Under CAFA, however, the question is not whether the State has standing to sue, but whether more than 100 persons, one of whom is diverse from any defendant, are real parties in interest for any claim asserted by the Attorney General. Labeling this entire action as *parens patriae* is unrelated to this jurisdictional question under CAFA. Indeed, in this action the Fifth Circuit did not address the *parens patriae* standing issue. Pet. App. 7a; *see also Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429 (5th Cir. 2008).

The Attorney General cannot deny that States often assert multiple claims in different capacities in a single suit, R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's *The Federal Courts and the Federal System*, 259 (6th ed. 2009) ("States can bring suit in a number of different capacities—and sometimes in more than one capacity in a single litigation."), and this Court has made clear that *parens patriae* standing is assessed claim by claim. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (distinguishing North Dakota's claim for injunctive relief to vindicate a quasi-sovereign interest from its claim for a "monetary decree" brought on behalf of individual farmers); *Pennsylvania*, 426 U.S. at 665-66 (assessing first "the claims brought by the plaintiff States on their own behalf" and then evaluating Pennsylvania's "claim against New Jersey as parens patriae on behalf of its citizens"). Thus, the Attorney General is mistaken in arguing that *parens patriae* standing somehow imbues special characteristics to an *entire* action.

Steering even further from CAFA's text and the facts of this action, the Attorney General argues that if the Court focuses on the real parties in interest, all classic *parens patriae* cases seem like removable class actions. Br. 45-46. This is untrue. Actions for injunctive relief are not removable as mass actions, which are limited by definition to claims for "monetary relief." 28 U.S.C. § 1332; *see Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Missouri v. Illinois*, 180 U.S. 208, 211-12 (1901).

Moreover, the Attorney General cites two *parens patriae* actions involving monetary relief claims that also would not have been mass actions under CAFA. Br. 55 (citing *Kansas v. Colorado*, 533 U.S. 1 (2001) and *Texas v. New Mexico*, 482 U.S. 124 (1987)). Those cases involved violations of an interstate compact where individual citizens' financial losses were considered only as "the measure of damages" for the contractual breach. *Kansas*, 553 U.S. at 8-9. But only the State was a real party in interest, as it was the only party to the compact, and the damages belonged to the State, whose discretion as to the "disposition of any recovery of damages [was] entirely unencumbered." *Id.* at 8.

Finally, the Attorney General alleges that the State has a quasi-sovereign interest based on alleged "injury to a significant segment of [Mississippi's] population[.]" Br. 40. Again, the existence of a purported quasi-sovereign interest in an action does not prevent private parties from being real parties in interest for jurisdictional purposes for the claims asserted on their behalf. The restitution claims for consumer overpayments redress injuries to private interests regardless of whether defendants' alleged

conduct may have also implicated the state's sovereign and quasi-sovereign interests. Even if the State has standing to assert restitution claims on behalf of individual citizens—whether through common-law or statutory *parens patriae* standing, or some other basis as a representative party in its sovereign or proprietary capacity—the restitution claims are still "monetary relief claims" on behalf of "100 or more" private persons.

2. Congress knew "mass actions" would include statutory "*parens patriae*" actions asserting "monetary relief claims" on behalf of numerous "persons."

There is a special, pre-CAFA historical context for "monetary relief claims" filed by state attorneys general in antitrust cases on behalf of numerous "persons," illustrating that (1) Congress crafted CAFA's "mass action" definition to capture those actions, and (2) the mere label of "*parens patriae*" does not determine mass-action removability.

In the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, Congress used the term "*parens patriae*" to describe a new action under the Clayton Act for state attorneys general. Prior to HSR, this Court had held that the Clayton Act did not authorize a state *parens patriae* action for money damages for injury to its quasi-sovereign interest in the general economy. *Hawaii v. Standard Oil of California*, 405 U.S. 251, 262-64 (1972). The Ninth Circuit took the *Hawaii* decision a step further, holding that a State could not proceed in a representative capacity as *parens patriae* to obtain antitrust damages for injuries suffered by individuals

(which are not quasi-sovereign interests). *California v. Frito-Lay*, 474 F.2d 774 (9th Cir. 1973).

Congress responded by enacting the Clayton Act's "*parens patriae*" provisions, 15 U.S.C. §§ 15c-15h, as part of HSR to overrule *Frito-Lay* (but not *Hawaii*). *See, e.g., Allstate*, 536 F.3d at 427 n.5; Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679, 713 n.195 (1977). HSR provided that "[a]ny attorney general of a State may bring a civil action . . . as parens patriae *on behalf of* natural persons residing in such State . . . to secure *monetary relief* . . . for injury sustained by such *natural persons* to their property . . . ." 15 U.S.C. § 15c(a)(1). This new action had nothing to do with the "quasi-sovereign" interests required for common-law *parens patriae* standing. *See Snapp*, 458 U.S. at 601. Instead, the new action was actually a representative action for "monetary relief" on behalf of "natural persons," similar to a class action, with such persons entitled to claim against any damages recovered, and any judgment constituting res judicata as to any person who did not opt out. 15 U.S.C. § 15c(b)(3) ("[F]inal judgment . . . shall be res judicata as to any claim . . . by any person on behalf of whom such action was brought and who fails to [opt out] . . . .").

Prior to CAFA's enactment, between 1976 and 2003, fourteen states (although not Mississippi) adopted "mini-HSR" legislation likewise expressly authorizing actions for "monetary relief" on behalf of

"persons" (or sometimes "natural persons") by state attorneys general.[5]

This Court has emphasized that such statutory "*parens patriae*" actions vindicate rights belonging to injured persons, not a State, and do *not* create any right of recovery distinct from that belonging to the individual. *See, e.g., Kansas v. UtiliCorp United*, 497 U.S. 199, 219 (1990) ("[HSR] did not establish any new substantive liability. Instead, 'it simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4 of the Clayton Act'" for persons injured in their business and property) (quoting *Pennsylvania v. Mid-Atlantic Toyota*, 704 F.2d 125, 128 (4th Cir. 1983)).

Thus, rather than enabling suit to protect or vindicate a State's "quasi-sovereign" interest as *parens patriae*, the federal and state HSR "*parens patriae*" provisions authorizing state attorneys general to bring actions for "monetary relief" on behalf of injured "persons" are the functional equivalent of class actions, but enabling state attorneys general rather than class representatives

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[5] *See* R.I. Gen. Laws § 6-36-12 (1979) (A.G. action "as parens patriae on behalf of persons" in the state "to secure monetary relief"); *see also* Alaska Stat. § 45.50.577 (2003) Ark. Code Ann. § 4-75-315 (2003); Cal. Bus. & Prof. Code § 16760 (2002); Or. Rev. Stat. § 646.775 (2001); Idaho Code Ann. § 48-108 (2000); Fla. Stat. Ann. § 542.22 (1997); 6 Del. Code Ann. tit. 6, § 2108 (1995); S.D. Codified Laws § 37-1-23 (1980); Mass. Gen. Laws Ann. ch. 93 § 9 (1978); W. Va. Code § 47-18-17 (1978). Some state statutes use the term "damages" or "monetary damages" instead of "monetary relief." *See* Okla. Stat. Ann. tit. 79, § 205 (1998); Colo. Rev. Stat. Ann. § 6-4-111 (1992); Conn. Gen. Stat. § 35-32 (1976).

to bring the action. *Mid-Atlantic Toyota*, 704 F.2d at 128 ("[T]he Act was aimed primarily at enlarging the potential for consumer recovery . . .").

On its face, CAFA's mass-action provision applies to class-action substitutes brought by state attorneys general; indeed, Congress used the exact same terms of "monetary relief" and "persons" found in the state HSR acts. Congress, in enacting CAFA, must be assumed to have been aware of that potential application given the spate of state legislation following Congress's own enactment of a "*parens patriae*" action. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that "[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" after observing that at least fifteen states had enacted statutes that "were solidly entrenched at the time of" Congress's enactment). That Congress did not exclude suits brought by attorneys general despite that knowledge only further confirms that these suits can qualify as "mass actions."

C. The "General Public" Provision Does Not Aid The Attorney General.

Faced with authority that supports the claim-by-claim and real-party analysis, the Attorney General argues that applying such an approach would run afoul of CAFA's "general public" provision, rendering it surplusage. Br. 25. That provision provides that "the term 'mass action' shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute

specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

The State's argument starts from a false assumption. The State assumes that the "general public" provision must be an *exception* that carves out a category of actions that would otherwise be mass actions, as opposed to a *clarification* of the scope of the defined term "mass action." Congress drew an express distinction between claims "on behalf of the general public" and claims "on behalf of individual claimants." Even if the phrase "monetary claims of 100 or more persons" were ambiguous as to whether it included an action asserting exclusively claims on behalf of the general public, Congress removed that ambiguity by expressly excluding such an action from the mass-action definition. A provision that has the purpose of clarifying what is and is not permitted is not surplusage, but beneficial interpretive guidance. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 98 (2006) (rejecting surplusage argument where statutory section "clarifies that administrative offsets are not covered by" the statute); *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (the statutory phrase "and costs" would "not be superfluous if Congress included it to remove doubt that defendants may recover costs when plaintiffs bring suits in bad faith").

In any event, there can be claims on behalf of the general public that are also "monetary relief claims of 100 or more persons" who are the real parties in interest. As the Attorney Generally concedes in a footnote, the provision could apply to suits "by private plaintiffs on behalf of the general public." Br. 25 n.5. "[A]n action to recover civil penalties 'is

fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (citations omitted). Some States assign the State's right to collect civil penalties to private litigants, *see* Cal. Lab. Code § 2699 (permitting employees to bring representative action on the State's behalf but keep a portion of the collected penalties as incentive to sue); *Statutory Penalties – A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938) ("[T]he action may be allowed to the injured party, to the state, or to anyone . . ."); making the private litigant a joint real party in interest with the State, *see Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 284-85 (2008) (partial assignees are a real party in interest); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000) (relator gained an interest in the lawsuit by "a partial assignment of the Government's damages claim"). CAFA's "general public" provision serves to exclude those suits from the definition of "mass action." *See* Schaerer, 16 N.Y.U. J. PUB. POL'Y at 80 n.219 (provision "may still apply where hundreds of private parties assert monetary claims only on behalf of the general public under, for example, a private attorney general act (PAGA)").

These suits are not uncommon. The lower courts have understood when private suits are on behalf of the "general public" and when they are not. *See, e.g.*, *Sample v. Big Lots Stores Inc.*, No. 10-3276, 2010 WL 493992, at *5 (N.D. Cal. Nov. 30, 2010) (remanding action under CAFA: "Unlike the antitrust damages sought on behalf of policyholders in *Caldwell*, PAGA's civil penalties are not meant to compensate unnamed

employees because the action is fundamentally a law enforcement action.").

Nor are civil penalty suits the only way in which the "general public" provision has meaning. An action where 100 cities or government agencies joined together to sue might qualify as a "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i), but nonetheless be excluded from the term by the "general public" provision. *Cf. Moor*, 411 U.S. at 721 (counties are citizens for diversity purposes).

Regardless, as the Fifth Circuit correctly held, Pet. App. 9a., the Attorney General cannot find shelter under the "general public" provision because that provision applies only when (1) "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" and (2) "pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The restitution claims for consumer overpayments are not asserted "on behalf of the general public" but rather "on behalf of individual claimants" (the injured persons who are the real parties in interest in the restitution claims). Moreover, the Attorney General can point to no provision of any state statute "specifically authorizing" it to seek restitution relief on behalf of the general public as opposed to affected individuals.

Sensing vulnerability, the Attorney General argues alternatively that even under the claim-by-claim approach, the number of claims here is so large it should be deemed to be on behalf of the general public. Br. 56. The Attorney General cites no textual basis for this argument as there is none to cite. Congress's purpose in passing CAFA was to make

sure high-exposure, class-like cases could be brought to federal court. *See supra* 3-5. Equally problematic, having wrongly claimed that defendants' construction would render the "general public" provision redundant, the Attorney General, himself, advances an argument that would render void the provision's parenthetical clause "(and not on behalf of individual claimants or members of a purported class)." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (The canon against surplusage "assists only where a competing interpretation gives effect to every clause and word of a statute.") (internal quotation marks omitted). The Attorney General asserts restitution claims on behalf of individual consumers. Consequently, not "all claims" in this action are asserted on behalf of the "general public" and the provision does not apply.

III. Congress Accommodated Federalism Concerns In CAFA.

Ignoring that diversity jurisdiction generally, and CAFA's new minimal-diversity standards in particular, seek to protect out-of-state defendants from the potential state-court biases, the Attorney General also argues: "Ultimately, this is a case about federalism and respect for the institutional sovereignty of the States and their chief legal officers, legislatures, and judicial systems." Br. 10. Ultimately, in fact, this is a case about statutory interpretation and federal jurisdiction, addressing how, not if, Congress chose to exercise its plenary authority. Congress has Article III power to authorize removal of mass actions, even if they include claims by state plaintiffs. *See* U.S. Const. art. III, § 2; *Alden v. Maine*, 527 U.S. 706, 715-19

(1999). Regardless, CAFA expressly carved out several federalism-driven exclusions from removal—none of which mention actions brought by States or state attorneys general. Indeed, CAFA's sole mention of state attorneys general is in the Section 1715 requirement that state attorneys general be notified of class settlements. Furthermore, the Attorney General's retreat to CAFA's demonstrably unreliable legislative history in search of an implied exclusion from removal is in vain; indeed, the final legislation omitted an exclusion for state attorney general actions contained in prior versions of the bill.

Thus, despite the Attorney General's plea to the contrary, allowing removal here would not affect the Attorney General's authority or invade a sovereign interest. It would simply allow the case to proceed in federal court.

A. CAFA Addressed Federalism Concerns By Specifying Certain Exclusions From Removal That Are Inapplicable Here.

CAFA specifies several exclusions from removal that demonstrate Congress's deliberate attention to federalism concerns. Significantly, the Attorney General has never claimed that any such exclusions apply here.

First, accommodating sovereign-immunity concerns, CAFA does not provide diversity jurisdiction for any class or mass action in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief[.]" 28 U.S.C. § 1332(d)(5)(A).

Second, CAFA excludes mass actions in which "all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State[,]" such as a disaster like a chemical spill. 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

Third, CAFA does not extend diversity jurisdiction to any class or mass action relating to corporate governance that arise under the laws of the State of incorporation. 28 U.S.C. § 1332(d)(9)(B).

Fourth, CAFA does not extend diversity jurisdiction to class and mass actions in which greater than two-thirds of the members of the proposed plaintiff classes, and at least one defendant "from whom significant relief is sought," are citizens "of the State in which the action was originally filed," if no similar class action has been filed against any defendant within the last 3 years. 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(aa)-(A)(ii). Thus, Congress decided that even for otherwise local controversies there would be no exclusion from removal for copycat actions, like this one.

These exclusions, among others, demonstrate Congress's sensitivity to federalism concerns in CAFA, none of which yielded any exclusion for state attorney general actions as *parens patriae* or otherwise. An action brought by a State could qualify for one of these exclusions, but it is undisputed that this action does not.

B. The Legislative History Shows Only That CAFA Once Had, But Eliminated, An Exclusion For State Attorney General Actions.

The Attorney General concedes that "there is no reason to consult legislative history in this case." Br. 33. He nonetheless relies on it to argue that the "mass action" provision should be read to apply only to "monetary relief claims of 100 or more *named plaintiffs*" and, separately, that actions by state attorneys general are categorically excluded. *See* Br. 33-38. Relying on legislative history for statutory construction, of course, "has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'" *Allapattah*, 545 U.S. at 568 (citation omitted).

That observation applies with special force here because "CAFA's legislative history is particularly suspect in that it represents the views of only a handful of legislators." *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 160 n.6 (3d Cir. 2013). Specifically, "the Senate report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009). Therefore, the Attorney General's reliance on that post-enactment report's description of "mass actions" as being "brought on behalf of numerous named plaintiffs," Br. 34, contributes little to construing the distinctly different words that Congress enacted in CAFA: "the authoritative statement is the statutory

text, not the legislative history or any other extrinsic material." *Allapattah*, 545 U.S. at 568.

If CAFA's legislative history has any probative value, it shows that proposed versions of CAFA included an exclusion from removal for state attorney general actions that was dropped from the final legislation. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also, e.g.*, *Arizona v. California*, 373 U.S. 546, 580-81 (1963) (construing the deletion of limiting language from a bill considered by the 69th Congress to signify that no such limitation was intended in the final version enacted into law by the 70th Congress).

Congress considered the first CAFA bill in 1998. S. 2083, 105th Cong. (1998). The first reference to an exclusion for state attorney general actions appeared three years later in the proposed Class Action Fairness Act of 2001. S. 1712, 107th Cong. (2001). That bill revised the definition of removable class actions to include "civil actions" filed by a "named plaintiff [who] purports to act . . . for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, *and is not a State attorney general*[]" *Id.* § 4(d)(9)(A)(i) (emphasis added). This language, though maintained in the next version of the bill considered by the 108th Congress, S. 274, 108th Cong. (2003), was ultimately removed upon its report out of the Judiciary Committee in that same Congress. S. 274, 108th Cong. (as reported by S. Comm. on the Judiciary, June 2, 2003). No reference

to state attorneys general, other than in the settlement notice provision that ultimately became Section 1715, appeared in any subsequent bill or the enacted law. (Likewise, the reference to "named plaintiff" in the prior bill was eliminated, never reappeared, and was not enacted.)

Moreover, as noted above, 46 state attorneys general sought a CAFA exemption for attorney-general actions, but the Pryor amendment was decisively defeated in the Senate. *Supra* 5.

The Attorney General selectively quotes five senators from the floor debate who voted against the amendment, contending that they did so because the amendment was "unnecessary." Br. 36-37. *But see* Jacob Durling, Note, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. COLO. L. REV. 549, 580-81 (2012) ("Basing a view of the legislative history on this point ignores the larger reasons behind CAFA's enactment. CAFA was intended to address abusive litigation practices.").

The Attorney General never mentions that the same senators he quotes feared that the Pryor amendment would undermine CAFA's purposes:

- SPECTER: "[P]roviding that any civil action brought by or on behalf of the attorney general in a State would be excluded so that there would be latitude for the attorney general to deputize private attorneys to bring their class actions and to find an exclusion, which is a pretty broad exclusion, not to

use pejorative terms, but [is] a pretty broad loophole." 151 CONG. REC. S1157 at S1161.[6]

- CORNYN: "[T]his amendment as worded—and I know this is not his intention—would create a loophole big enough to drive a truck through, that could cause substantial mischief that is intended to be prevented by this very bill." *Id.*

- GRASSLEY: "Although this amendment sounds good, and there was a good presentation made by the authors of the amendment, it is potentially harmful and could lead to gaming by class action lawyers." *Id.* at S1163.

- HATCH: "At best, this amendment is unnecessary. At worst, it will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court." *Id.*

* * *

The only conclusive point that can be drawn from CAFA's legislative history is that Congress considered and rejected an exclusion for state attorney-general actions. Nothing in that history trumps CAFA's plain language, which authorizes removal of this action because the attorney general has brought restitution "claims" that belong to "100 or more persons" for joint trial.

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[6] *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493, 498, 524 (2012) ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action. . . . [A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis.").

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted.

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REPLY BRIEF

No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

CAFA's "mass action" provision, 28 U.S.C. § 1332(d)(11)(B)(i) (reprinted at J.A. 78a-80a), does not eliminate the States' authority, acting through their politically accountable chief legal officers, to bring *parens patriae* actions seeking monetary relief in state court.

Ultimately, this case is about federalism, as demonstrated by the 46 States supporting Petitioner as amici. States have compelling reasons to file *parens patriae* actions in state courts and should not be made dependent on federal courts to enforce state law. Indeed, during CAFA's enactment, the statute's proponents assured state attorneys general that it would not include *parens patriae* actions.

The proper jurisdictional analysis is straightforward. In a state-law *parens patriae* action, the State is the only "plaintiff," and the "claims" belong solely to the State. Because a State is not a "citizen" for diversity purposes, there is no federal subject-matter jurisdiction.

CAFA is silent regarding *parens patriae* actions. Respondents nonetheless contend that it has the effect of sweeping such actions into federal court. Respondents' argument requires them to prove *each* of the following: (i) CAFA adopts a "real-party-in-interest" test, Resp.Br.19; (ii) consumers should be deemed "unnamed real parties in interest" for purposes of restitution claims, *id.* at 23; and (iii) States' actions should be re-imagined for removal purposes as though they included those consumers. *Id.* Every step of the argument is flawed.

First, CAFA's text and structure show that it cannot be extended to *parens patriae* actions via Respondents' "real-party-in-interest" approach. CAFA's "mass action" definition refers to actual "plaintiffs" asserting concrete "claims," not to "unnamed real parties in interest." Respondents implausibly suggest that the term "plaintiffs" has two different meanings *seventeen words apart* in the same CAFA subsection. Resp.Br. 23.

Respondents' convoluted statutory interpretation would turn a jurisdictional scheme (where simplicity and administrability are prime virtues) into a procedural nightmare. Trial courts would be forced to ascertain the value of hypothetical and unasserted "claims" by thousands or millions of consumers, as well as those consumers' views on venue transfer, and to remand to state court "claims" of consumers that had never been brought in the first place.

Even if CAFA adopted Respondents' "real-party-in-interest" test, the State would meet it. The relevant "claims" belong to the State, not consumers. Regardless of whether consumers might ultimately benefit, they are not the legal holders of the claims asserted by the State in its own name under the Mississippi Antitrust Act ("MAA") and Mississippi Consumer Protection Act ("MCPA").

Respondents ignore the nature of *parens patriae* actions, in which States assert their *own* sovereign and quasi-sovereign interests. Even if consumers might indirectly benefit from state restitution claims, such claims vindicate *public* rights, not *private* ones.

If Respondents believe Mississippi lacks legal authority to assert its claims, their proper recourse

is a motion to dismiss under Mississippi law in state court, not removal. The "real-party-in-interest" test does not justify re-imagining the State's action for removal purposes as though it included phantom "claims" by consumers.

I. *PARENS PATRIAE* ACTIONS ARE NOT "MASS ACTIONS" UNDER CAFA.

A. CAFA's Text Is Dispositive.

1. The "Mass Action" Definition Focuses On Actual "Plaintiffs" Asserting "Claims."

CAFA does not adopt Respondents' "real-party-in-interest" test. CAFA refers to "plaintiffs" (actual parties) and "claims" (court-enforceable causes of action). Pet.Br. 16-18. The only "plaintiff" in a *parens patriae* action is the State, and the only "claims" are the State's.

Respondents' argument that the term "plaintiffs" includes "unnamed real parties in interest" (Resp.Br. 23) violates settled definitions of "plaintiff" as denoting a formal party to a lawsuit. Pet.Br. 17. Real parties in interest who do not appear in a lawsuit are not "parties." *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009).

Respondents cite CAFA's reference to the "monetary relief claims of 100 or more persons" and propose that "persons" need not be limited to "plaintiffs." Resp.Br. 18-22. But the statutory provision itself equates "persons" with "plaintiffs." The first clause of § 1332(d)(11)(B)(i) refers to the "*plaintiffs*' claims" (emphasis added) in specifying

the claims of the "100 or more persons" at issue. The second clause then refers to the same "persons" as "*those plaintiffs*" in providing that "jurisdiction shall exist only over *those plaintiffs* whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.* (emphasis added).

CAFA also refers to "plaintiffs" in the *plural*. Even under Respondents' interpretation, the statute would not encompass *parens patriae* actions, which (even if they could be said to contain many "unnamed real parties in interest") have only *one* plaintiff: the State.

Moreover, CAFA uses the phrase "persons (named or unnamed)" only in the "class action" definition of § 1332(d)(1)(D). This phrase is specifically *not* included in the definition of a "mass action." *See* 28 U.S.C. § 1332(d)(11)(A) (referring to subparagraphs 1332(d)(2)-(10)); *id.* § 1332(d)(11) (B)(i) ("class action" definition excluded). Respondents disregard CAFA's distinction between "plaintiffs" and "persons (named or unnamed)."

Respondents cite the Magnuson-Moss Act. Resp.Br. 20. But the Act refers to a "plaintiff" as a formal party to a lawsuit, 15 U.S.C. § 2310(d)(2), and therefore supports Petitioner's interpretation.[1]

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[1] The reference in 15 U.S.C. § 2310(d)(3)(C) to "named" plaintiffs (Resp.Br. 20) does not help Respondents. It distinguishes between class representatives and absent class members. Resp.Br. 20 n.2; *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). However, there is no need for a similar approach in *parens patriae* actions, where consumers are not parties.

2. A "Mass Action" Must Propose To Try The "Claims" "Jointly."

To constitute a "mass action," a civil action must propose a "joint[]" trial of the "monetary relief claims of 100 or more persons," on the ground that they involve "common questions of law or fact." Thus, the statute contemplates a (1) joint trial of (2) actual claims of (3) genuine plaintiffs.

That will not occur here. The undefined "claims" of "unnamed persons" will not and cannot be "tried jointly" in any meaningful way. The trial will involve the State's claims, rather than the phantom "claims" of thousands of consumers.

Respondents' argument that "[e]very sentence of CAFA's 'mass action' definition" refers to "claims" (Resp.Br. 16) (quoting heading) proves Petitioner's point: CAFA uses the term "claims," not "abstract interests" or "indirect benefits."

The need for precision in defining "claims" is underscored by CAFA's tolling provision, which suspends limitations for "claims" during removal to federal court. 28 U.S.C. § 1332(d)(11)(D). That provision is unworkable unless "claims" are clearly defined. Abstract interests of unnamed persons do not count.

Respondents maintain that *parens patriae* cases are analogous to class actions. Resp.Br. 27. However, in a class action, absent class members assert the same legal claims as class representatives. Here, it is uncontested that Mississippi consumers *cannot* assert the same claims as the State. Pet.Br.

5. These consumers are not comparable to absent class members in a class action. *See* Part II, *infra*.

Respondents point to the Hart-Scott-Rodino ("HSR") Act, Resp.Br. 47-48, but the HSR Act rejects Respondents' class action analogy. *See Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1983) (HSR Act "exempts such suits from the class-action requirements of Rule 23"). The HSR Act reflects Congress' understanding that *parens patriae* actions do *not* involve "joint[]" trials of individual claims. The Act authorizes proof of aggregate damages in *parens patriae* actions on a state-wide statistical basis, without proof of individual loss by consumers. 15 U.S.C. § 15d.[2]

3. Respondents Ignore The Ban On The Creation Of A "Mass Action" By A Defendant's Joinder Motion.

Respondents ignore § 1332(d)(11)(B)(ii)(II), which provides that a defendant's joinder motion cannot create a "mass action" eligible for removal. Respondents have no answer to the fact that they are trying to achieve indirectly what CAFA bans them from accomplishing directly.

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[2] Respondents incorrectly argue the HSR Act shows the rights at issue "belong[] to injured persons." Resp.Br. 47. In fact, the Act creates an enforcement right in the States rather than consumers. *See* 15 U.S.C. § 15c(a)(1). In any event, the MAA and MCPA create new causes of action for the State in its own name.

4. Respondents' Interpretation Would Create An Administrative Nightmare.

CAFA provides that federal subject-matter jurisdiction in a "mass action" "shall exist *only* over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). Respondents would require a trial court to identify consumers harmed by the defendants' conduct, examine the circumstances of each consumer, ensure that each meets the $75,000 threshold, and remand to state court the supposed "claims" of consumers (who had never sued in the first place) falling below the threshold. The nightmare is not conjectural. *See* Pet.App. 52a-54a; *Mississippi ex rel. Hood v. Entergy Miss., Inc.*, 2012 WL 3704935, *9 (S.D.Miss. Aug. 25, 2012) (confirming requirement to remand "individual claims" below $75,000); *Hood ex rel. Mississippi v. JPMorgan Chase & Co.*, 2013 WL 3946002, *14 (S.D.Miss. July 31, 2013) (requiring discovery to identify consumers and determine amount in controversy for each).

Similarly, CAFA bans transfer of a mass action to another court "unless a majority of the plaintiffs in the action" consent. 28 U.S.C. § 1332(d)(11)(C)(i). Respondents offer no procedure for a district court to identify and communicate with consumers – potentially "millions" in this case, Pet.App. 55a – let alone to determine their views on transfer.

Respondents assert that this Court need not resolve these practical problems because they do "not concern the removability of the 'action.'" Resp.Br. 25. But the problems flow inexorably from

Respondents' flawed statutory interpretation, which is a powerful reason to reject it. "[S]implicity is a virtue" in jurisdictional statutes. *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013).

Respondents resort to the dubious argument that the term "plaintiffs" means one thing in the first part of § 1332(d)(11)(B)(i) and something else seventeen words later in the *same sentence*. Resp.Br. 23. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S.Ct. 1997, 2004-05 (2012) (internal quotation marks omitted). *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (Resp.Br. 23), which involved two different air pollution control schemes, is inapposite.

Respondents' theory that supplemental jurisdiction (Resp.Br. 25) would prevent the administrative nightmare is unavailing. Supplemental jurisdiction does not apply where "expressly provided otherwise by Federal statute." 28 U.S.C. § 1367(a). Here, CAFA expressly provides "otherwise." In the last clause of § 1332(d)(11)(B)(i), Congress explicitly excluded jurisdiction over claims less than $75,000.

Further, § 1367(b) provides that supplemental jurisdiction does not extend to claims "by persons proposed to be joined as plaintiffs," which is effectively what Respondents seek to do with respect to Mississippi consumers. Supplemental jurisdiction may be declined where there are "novel or complex issue[s] of State law" or state-law claims that "substantially predominate." 28 U.S.C. § 1367(c)(1),

(c)(2). Finally, supplemental jurisdiction must be construed narrowly where principles of federalism are at stake. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-46 (2002).

5. The "General Public" Exception Is Further Evidence That CAFA Excludes *Parens Patriae* Actions.

Respondents argue that the "general public" exception was meant to clarify any ambiguity in CAFA. Resp.Br. 49. To the extent the exception clarifies, it reaffirms that CAFA excludes *parens patriae* actions.

The exception clarifies that CAFA does not include actions brought on "behalf of the general public." As shown at Pet.Br. 56-58, *parens patriae* actions typically qualify as suits filed on "behalf of the general public."

Even an article published by Respondents' amicus DRI concludes that "enforcement actions filed by State AGs are specifically excluded from the statute's coverage." Peter M. Cummins, *Parens Patriae Suits Filed by State AGs*, FOR THE DEFENSE 39, 40 (Feb. 2008). Other authorities agree. Pet.App. 47a (citing articles).

Respondents acknowledge the "general public" exception applies where the State's recovery is "'not meant to compensate unnamed'" persons. Resp.Br. 50-51 (citation omitted). That concession covers this case, because the State's restitution claim vindicates public rights, not private rights. *See* Part II-A, *infra*.

B. If There Were Any Statutory Ambiguity, Principles Of Federalism Would Be Dispositive.

If there were any doubt, federalism would compel that CAFA be narrowly construed. Respondents contend that CAFA altered the traditional rule compelling narrow construction of removal statutes. Resp.Br. 36-42. But in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), a CAFA case, this Court continued to cite decisions applying the traditional rule. *See id.* at 96 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Respondents' CAFA cases also reaffirm the traditional rule. *E.g.*, *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir.), *cert. denied*, 558 U.S. 934 (2009) (cited at Resp.Br. 55).

Respondents argue that "strict construction" reflects a congressional "policy" which the legislature may alter. Resp.Br. 36. But the "policy" in question is a fundamental one: "'[d]ue regard for the rightful independence of state governments.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941)). This principle is far too deeply rooted to be cast aside absent explicit congressional direction. "[A] 'strict construction' of the federal removal statutes" is one of the "bedrock principles of removal jurisdiction" and reflects this Court's "long tradition of respect for the autonomy and authority of state courts." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 17-18 (2003) (Scalia, J., dissenting). This Court presumes that "'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not

unduly interfere with the legitimate activities of the States.'" *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2336 (2010).[3]

Nothing in CAFA abrogates this principle. Indeed, Respondents acknowledge that CAFA provisions "demonstrate Congress's sensitivity to federalism concerns." Resp.Br. 54. Far from restricting state attorneys general, CAFA expanded their authority over class action settlements. 28 U.S.C. § 1715.

Respondents also concede that CAFA's findings refer to "the concept of diversity jurisdiction as intended by the framers of the United States Constitution." Resp.Br. 39 (citing J.A. 53a-54a).[4] The framers intended to protect the independence of state governments. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Respondents' interpretation would substantially interfere with the authority of States to enforce their own laws in their own courts. Such a result is inconsistent with the States' status "as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Respondents' approach would make States dependent on federal courts for the interpretation

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[3] *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (cited at Resp.Br. 41), is inapposite. It involved removal of a federal cause of action under the Fair Labor Standards Act, not a state-law claim removed under diversity.

[4] Contrary to Resp.Br. 38-39, *parens patriae* actions do not implicate traditional concerns of diversity jurisdiction, which has never been available where the State is the sole plaintiff. A State is not a "citizen" for purposes of diversity. *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894).

and enforcement of their own laws, which this Court has suggested would be constitutionally problematic. *Id.* at 750.

C. Legislative History Confirms That CAFA Does Not Extend To *Parens Patriae* Actions.

This Court need not consider legislative history to reverse. Nevertheless, CAFA's proponents assured the States that the bill would not cover *parens patriae* actions. Pet.Br. 35-37. On that basis, Congress rejected the Pryor amendment. Resp.Br. 56-58. As Sen. Grassley explained,

> [T]he amendment is not necessary. . . .If State attorneys general want to recover on behalf of their citizens, they can always bring actions as *parens patriae* suits under statutes that authorize representative actions or even as direct enforcement actions. Again, such lawsuits will not be subject to this bill.

151 Cong. Rec. S1163 (daily ed. Feb. 9, 2005) (assuring that such suits would proceed "in State court"); *see also id.* at S1161-62 (Sen. Cornyn); *id.* at S1163-64 (Sen. Hatch).

Respondents contend that the Pryor amendment was defeated for fear it would create a "loophole" in CAFA (Resp.Br. 57-58) but fail to cite the actual "loophole" language the bill's proponents found troubling. The amendment purported to exempt from CAFA "any action brought by, or *on behalf of*, the Attorney General of any State." 151 Cong. Rec. S1157 (emphasis added). Senators expressed concern that the phrase "on behalf of the Attorney

General" would "allow plaintiffs' lawyers to bring class actions and simply include in their complaint a State attorney general's name *as a purported class member*, arguably to make their class action completely immune to the provisions of this bill. . . . That creates a very serious loophole in this bill." *Id.* at S1163 (Sen. Grassley) (emphasis added). Rejecting this "loophole" was perfectly consistent with assuring the States that CAFA never included *parens patriae* actions in the first place.

Respondents now disavow the 2005 CAFA committee report as post-enactment history. Resp.Br. 55. That is unsurprising; the report equates "persons" with "named plaintiffs." S. Rep. No. 109-14, at 46 (Feb. 28, 2005). However, the disavowal weakens Respondents' argument. *Caldwell*, which created the rule followed below, relied on the committee report. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008). Respondents' own amici rely on the committee report. Allstate Br. 14, 19; DRI Br. 3, 21; PhRMA Br. 4, 5, 10. The treatise cited by Respondents to argue that CAFA altered the traditional "narrow construction" rule for removal statutes relies on nothing but the committee report. Resp.Br. 38 (citing 13F Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 3623, at 27 & n.37 (3d ed. 2013)).

Even without the 2005 committee report, the legislative history supports Petitioner. Respondents ignore the 2003 committee report addressing a predecessor bill, which described "mass actions" as suits involving "hundreds or thousands of *named* plaintiffs." S. Rep. No. 108-123, at 42 (2003) (emphasis added). The 2005 floor debate referred to

"mass actions" as being initiated by "a complaint in which 100 or more plaintiffs are named" (151 Cong. Rec. H729 (daily ed. Feb. 17, 2005) (Rep. Sensenbrenner)) and as actions by multiple plaintiffs "consolidated by State court rules." *Id.* at S1151 (daily ed. Feb. 9, 2005) (Sen. Reid).

II. CONSUMERS ARE NOT "REAL PARTIES IN INTEREST" IN THIS CASE.

Even if CAFA adopted Respondents' "real-party-in-interest" approach – and it does not – consumers would not be "real parties in interest" here. The claims at issue belong to the State, not consumers.

A. The Claims Belong To The State Alone.

A real party in interest is the "'legal holder of the claim.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 280 (2008). The MAA and MCPA explicitly authorize the Attorney General to sue "in the name of the State" to assert the claims in this case, without the participation of consumers. Miss. Code §§ 75-21-37, 75-24-9.

Respondents do not dispute that the statutory provisions invoked by the State are different from those on which consumers would rely for damages claims. Pet.Br. 5. Indeed, Mississippi consumers pursued their own claims as indirect purchasers in a federal MDL proceeding. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal.).[5]

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[5] Contrary to Respondents' suggestion (Resp.Br. 7 n.1), the federal MDL court opined that proposed consumer settlements would *not* release "*parens patriae* claims" of non-settling States and at a hearing "all of the Settling Defendants agreed." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, at 2

1. Mississippi's "Restitution" Claim Belongs To The State, Not Consumers.

The Complaint prays that "the Plaintiff, the State of Mississippi, be granted" relief, including "restitution and its damages in an amount according to proof." Resp.App. 65a-66a. Respondents incorrectly suggest that the word "restitution" means that the State is asserting claims belonging to consumers. Resp.Br. 9. To the contrary, the "restitution" Mississippi seeks is disgorgement of Respondents' ill-gotten gains. *See, e.g., Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (restitution remedy involves "disgorgement of proceeds"); *McCandless v. Furlaud*, 296 U.S. 140, 167 (1935) ("restitution of illicit profits").

The Complaint's general allegations that consumers have suffered harm do not mean that the claims "belong" to them, nor do the allegations constitute requests that individuals be directly awarded relief. Mississippi seeks to disgorge Respondents' gain, and consumer purchases are relevant as evidence of that gain.

The "on behalf of" language in the Complaint (Resp.Br. 9) does not change the nature of the State's action. *Parens patriae* cases are always filed "on behalf of" someone else. A sovereign or quasi-

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(N.D.Cal. Jan. 26, 2012) (Dkt. 4688). When defendants later proposed contrary language for the final approval order, *id.* at Dkt. 5600-5 ¶11, the federal MDL court crossed out defendants' proposed language. *Id.* at Dkt. 6130 ¶11; *see also In re Tricor Indirect Purchaser Antitrust Litig.*, 2009 WL 3460769, *1 (D.Del. Oct. 28, 2009).

sovereign interest "is precisely the type of interest that the State, as *parens patriae*, represents *on behalf of* its citizens." *South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) (emphasis added).

Respondents assert that Mississippi's Complaint echoes private complaints. Resp.Br. 7-8. In truth, all complaints borrowed heavily from the Department of Justice's criminal allegations against Respondents.

2. The Speculative Possibility Of Consumer Recovery Cannot Justify Removal.

Respondents contend that Petitioner's action seeks to "restore" monies or property "to any person in interest" in Mississippi. Resp.Br. 10, 14, 34. Having attempted to rewrite CAFA and Mississippi's Complaint, Respondents now rewrite the Question Presented to insert the word "restore." *Id.* at i.

However, the Complaint does not seek to "restore" money or property to consumers. In focusing on the term "restore," Respondents quote not the Complaint but language in the MCPA, which provides a Chancery Court with authority to "make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property" acquired by a defendant through prohibited means. Miss. Code § 75-24-11.

While the private suit provision empowers an individual seeking damages to "bring an action at law," *id.* § 75-24-15(1), the MCPA underscores that consumers are not the legal owners of the State's restitution claims, but rather are wholly dependent on the State's *parens patriae* action. *If* the Attorney

General brings an enforcement action, and *if* the court appoints a receiver in equity, the receiver *may* collect money or property "derived by means . . . prohibited by this chapter." *Id.* § 75-24-13. Any persons who have suffered loss "may participate with general creditors in the distribution of the assets," capped by the injured party's out-of-pocket loss. *Id.*

Moreover, Respondents' multi-step conjecture involves future, discretionary actions of the state court and any possible receiver. The state court has not appointed a receiver in this case, and no collection or distribution of assets has occurred. Respondents' speculation cannot provide a basis for removal at this time. "For jurisdictional purposes, [judicial] inquiry is limited to examining the case 'as of the time it was filed in state court.'" *Standard Fire*, 133 S.Ct. at 1349.

3. Respondents Concede That Future Disposition Of Any Recovery Is Immaterial.

Respondents acknowledge that both *Kansas v. Colorado*, 533 U.S. 1 (2001), and *Texas v. New Mexico*, 482 U.S. 124 (1987), are examples of "*parens patriae* actions involving monetary relief claims that also would not have been mass actions under CAFA." Resp.Br. 44. This concession is fatal, because the instant case is indistinguishable.

Both here and in those cases, States asserted rights in their own names – here, rights under the MAA and MCPA, and in *Kansas* and *Texas*, rights under water compacts. In both *Kansas*, 533 U.S. at 7-8, and *Texas*, 482 U.S. at 132 n.7, the State's restitution request was based on harm to individual

citizens. Indeed, in *Texas* this Court noted that the funds might be distributed to consumers or retained by the State. *Id.*

If (as Respondents concede) CAFA would not extend to the suits in *Kansas* and *Texas*, it does not apply here, either.

B. Respondents Misapprehend The Nature Of A *Parens Patrie* Case.

The tradition of *parens patriae* actions confirms that the State is properly the sole real party in interest. Respondents contend that, even if the State establishes *parens patriae* authority, this "does not prevent private parties from being real parties in interest." Resp.Br. 44. Respondents misstate the nature of *parens patriae* power. Once the State has demonstrated such authority, it may sue as the *sole* party in interest, without the joinder or intervention of additional parties. *New Jersey v. New York*, 345 U.S. 369, 373 (1953). The State has its own interest, "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 607 (1982).

This Court has stressed the factor of control in determining the real party in interest. *Kansas*, 533 U.S. at 8; *Knapp v. W. Vermont R. Co.*, 87 U.S. 117, 123 (1873). Mississippi has the sole right to control this litigation, and the "unnamed persons" cited by Respondents will not appear. The State will exercise 100% of the control and is the *sole* real party in interest.

Respondents' cases do not help them. In *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) (cited at Resp.Br. 19), this Court explained that the

"'residence of those who may have the equitable interest' is simply irrelevant," *id.* at 463, and such "'beneficiaries [are] not necessary parties and their citizenship [is] immaterial.'" *Id.* at 464. Mississippi consumers are similarly situated.

Missouri, Kansas & Texas Railway Co. v. Hickman, 183 U.S. 53 (1901) (cited at Resp.Br. 19, 24), involved an action that would not result in any recovery for the State and would not inure "in any degree" to the State's benefit. *Id.* at 59. Here, Mississippi seeks restitution *to the State* and has a sufficient interest to make it the sole real party in interest, even with respect to the restitution claim.

C. Respondents' Approach Conflicts With Longstanding Practice.

Respondents' approach would upset longstanding practice under which States and federal agencies seek restitution as sole plaintiffs, notwithstanding the possibility that consumers might ultimately receive some of the recovery. Restitution remedies are a matter of public, not private, right and confer no ability on private citizens to intervene. *E.g.*, *Getty Oil Co. v. Dep't of Energy*, 865 F.2d 270, 275 (Temp.Emer.Ct.App. 1988) ("[E]nforcement of a remedial restitution is the exclusive right of the government."); *see also SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 96 (2d Cir. 1978) (Friendly, J.) (SEC disgorgement actions).

This Court has upheld the Government's power to seek restitution in cases involving harm to consumers, without requiring that consumers be made parties to the litigation, and has afforded discretion in whether and how to distribute any recovery. *E.g.*, *Mitchell v. Robert DeMario Jewelry*,

361 U.S. 288, 296 (1960); *United States v. Moore*, 340 U.S. 616, 620 (1951). Often the Government does not make a distribution to consumers, particularly where it is impractical to do so. *E.g.*, *United States v. Exxon Corp.*, 773 F.2d 1240, 1284-86 (Temp.Emer.Ct.App. 1985), *cert. denied*, 474 U.S. 1105 (1986).[6]

Respondents' contrary approach would deem consumers the "owners" of the Government's "claims" and disrupt the settled practice by which agencies and courts administer a wide range of consumer protection statutes.

D. The Retention Of Private Counsel Is Irrelevant.

Retention of private counsel (Resp.Br. 7) is a matter within the sovereign authority of a State. There is a long tradition of reliance on private attorneys by all levels of government. *See Filarsky v. Delia*, 132 S.Ct. 1657, 1663 (2012). The issue is irrelevant to the Question Presented and does not change the nature of a *parens patriae* action.

Here, the Attorney General, pursuant to a delegation of authority from the Mississippi legislature, has retained private counsel to assist in certain *parens patriae* actions. Some attorneys general have made a similar decision; others have

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[6] Respondents exaggerate *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), as holding that a Government restitution claim "belongs" (Resp.Br. 32) to consumers. In fact, this Court did not require that consumers be made parties and stressed that any distribution was committed to the trial court's "equitable discretion." 328 U.S. at 399. The Court referred generally to "real parties in interest" (*id.* at 398), not to consumers in particular.

not. Counsel for Respondent Samsung entered into a contingency contract to represent the State of Minnesota in a *parens patriae* action.[7] One of Respondents' own authorities explains that "[p]rivate firms often have the necessary expertise that makes it cost effective for attorneys general offices with limited budgets to outsource particularly esoteric or complex work."[8]

The implication that retention of private counsel impairs an attorney general's control of the action is unfounded. *Every retainer agreement* obtained through amicus DRI's own research expressly mandates that the "AG retains control."[9] The retention agreement in the present case is the same, and the required control has been fully exercised.[10] Every court to consider the issue has upheld

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[7] *State ex rel. Swanson v. 3M Co.*, 2013 WL 3284285, *2 (Minn.Ct.App. July 1, 2013), *review granted*, Nos. A12-1856, A12-1867 (Minn. Sept. 17, 2013).

[8] Jacob Durling, Note, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U.COLO.L.REV. 549, 558 (2012) (cited at Resp.Br. 57).

[9] http://www.huschblackwell.com/files/Publication/d7a63e97-943-ce9-9a5a-aa61a6bfdd92/Presentation/Publication Attachment/026393d9-9aaa-48aa-bc82-abb484163812/McMeyer_Final_ 0611.pdf (Appendix B, DRI Master Chart of Contracts).

[10] www.agjimhood.com/images/uploads/forms/LCD Agreement.pdf. Citing a standard exhibit that is not LCD-specific, Respondents imply the signatories expected a high-value recovery. Resp.Br. 10. But the exhibit makes no prediction and is merely illustrative of fee calculations, based on hypothetical recoveries.

retention agreements where an attorney general retained ultimate control of the litigation.[11]

III. RESPONDENTS' ARGUMENTS GO TO THE MERITS, NOT REMOVAL.

A. If Respondents Believe The Attorney General Lacks Authority To Seek The Requested Relief, They Should Seek Dismissal, Not Removal.

Respondents argue (citing decisions from Arizona and Iowa) that the MCPA does not "authorize the court to disgorge consumer overpayments to the State." Resp.Br. 35. (Two pages earlier, Respondents state that "the Attorney General's authority is not in question before this Court." *Id.* at 33 (emphasis omitted)).

Any objection to the Attorney General's authority under Mississippi law would be misplaced. *Hood ex rel. Mississippi v. BASF Corp.*, 2006 WL 308378, *3-4 (Miss.Ch.Ct. Jan. 17, 2006) (Mississippi Attorney General has statutory and common law authority to sue as *parens patriae* under MAA and MCPA).

If Respondents believe the Attorney General lacks legal authority to assert claims in the Complaint, the proper recourse is a motion to dismiss under Mississippi law in state court. If Respondents believe that a portion of the requested relief is duplicative (Resp.Br. 34), that issue should

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[11] *E.g.*, *Merck Sharp & Dohme Corp. v. Conway*, 2013 WL 2297179, *5 (E.D.Ky. May 24, 2013), *appeal docketed*, No. 13-5729 (6th Cir.); *San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130, 1135 (N.D.Cal. 1997).

similarly be raised on the merits. If Respondents believe there are unsettled issues of state law regarding the Attorney General's authority, they should be decided by a Mississippi court.

B. The Real-Party-In-Interest Test Does Not Allow Respondents To Re-Imagine The Attorney General's Action As Though It Included Consumers.

The "real-party-in-interest" test – even if it applied – would not authorize Respondents to remove this case by re-imagining it as though it included Mississippi consumers. This Court has held that if the "named party's interest is real, the fact that other interested parties are not joined 'will not affect the jurisdiction of the [federal courts].'" *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 93 (2005) (quoting *Little v. Giles*, 118 U.S. 596, 603 (1886)); *cf.* Fed.R.Civ.P. 17(a)(1) (parties "authorized by statute" may "sue in their own names without joining the person for whose benefit the action is brought"). Respondents do not even cite *Lincoln*, let alone respond to it.

The cases cited by Respondents involve instances where the absence of real parties in interest provided a basis for dismissal, not removal, Resp.Br. 19 (citing *Stewart v. Baltimore & Ohio R.R. Co.*, 168 U.S. 445 (1897) (dismissal, which Court reversed); *Navarro*, 446 U.S. at 461 (same)), or instances where a State's presence in an action was challenged on the ground that it had no genuine interest. *See Ex parte Nebraska*, 209 U.S. 436, 445 (1908). In *Hickman*, 183 U.S. at 59-60, a state-created board of railroad commissioners filed suit in state court against a

railroad; the State was not a named party but unsuccessfully argued that it could prevent removal as the "real party in interest."

This case is different from those situations. Respondents do not seek to dismiss Mississippi's action on the ground that consumers are necessary parties, nor do they contend that the State should be dismissed as a plaintiff. Rather, they seek to recast the case as though "unnamed" "real parties in interest" had been added. Nothing in the "real-party-in-interest" test authorizes a removing defendant to re-imagine an action in such a fashion.

IV. IF IT REACHES THE ISSUE, THIS COURT SHOULD REAFFIRM THE "WHOLE CASE" APPROACH.

This Court need not consider either the "whole case" or "claim-by-claim" approach unless it concludes that: (i) CAFA incorporates a real-party-in-interest test, and (ii) consumers qualify as real parties in interest. In that event, this Court should reaffirm the traditional, "whole case" approach used by this Court and every Circuit other than the Fifth Circuit. However, even under a "claim-by-claim" approach, this Court should reverse. Pet.Br. 53-55. Respondents ignore Mississippi's showing that, even under a claim-by-claim analysis, the State is the real party in interest in a *parens patriae* action where it satisfies either the "substantial segment" or "lawmaking powers" test. *Id.* at 39-41.

The "whole case" approach properly follows this Court's instruction that whether a State is the real party in interest depends on "the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. 490, 500

(1921). That determination must be made according to whether the State is asserting sovereign or quasi-sovereign interests, not on the basis of the specific relief sought. *Snapp*, 458 U.S. at 607. A restitution claim reflects the State's quasi-sovereign interests because it advances the State's independent interest in enforcing its antitrust and consumer protection laws, even if consumers might ultimately receive part of the restitution award indirectly. Pet.Br. 39-43. The State possesses its own quasi-sovereign interests in seeking restitution, "independent of the benefits that might accrue to any particular individual." *Snapp*, 458 U.S. at 608. The State also seeks injunctive relief, civil penalties, and damages for its own purchases, all of which confirm the State's own interests.

Respondents' attack on the "whole case" approach (Resp.Br. 27-31) is misplaced. Even the cases they cite support it. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277-78 (1997) (looking to "the essential nature and effect of the proceeding") (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)) (cited at Resp.Br. 29); *Ex parte Nebraska*, 209 U.S. at 445 ("[W]hether the state of Nebraska is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record.") (cited at Resp.Br. 19). Respondents do not deny that supplemental jurisdiction and Article III's reference to "Cases" and "Controversies" support the "whole case" approach. Pet.Br. 49-50.

Respondents note that sovereign immunity defenses are analyzed claim-by-claim, to ensure that a plaintiff cannot circumvent the Eleventh Amendment. Resp.Br. 28-30. But that

demonstrates judicial solicitude *in favor of* States and provides no basis for diminishing their sovereignty by discounting their *parens patriae* interests.

Further, proceeding "claim-by-claim" in the sovereign immunity context leads to dismissal of barred claims. Here, Respondents' novel approach would require federal courts to bifurcate *parens patriae* actions, leaving "restitution" claims in federal court while remanding injunctive, civil penalty, and other claims to state court. Such bifurcation would interfere with state enforcement actions.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL
Petitioner,

v.

AU OPTRONICS CORP., ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP does not endorse candidates for public office or make contributions to political campaigns or candidates.

AARP works to protect older people from illegal and harmful practices that target or have a disproportionate impact on them. Older people are targets either because they have significant assets which may be plundered or have only meager assets which they worry will be insufficient to sustain them throughout their lives. This makes them susceptible to scams that promise greater financial security. As a result, millions of older people have seen their life savings and home equity stripped away by—among a long list of practices—unscrupulous lending and servicing, mortgage rescue and other scams, and fraudulent or unsuitable investment and insurance sales. In addition, as the physical independence and

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this amicus curiae brief. Letters reflecting the consent of the parties are being filed with this brief.

health of older people deteriorate, they are at their most vulnerable: their very lives are endangered by negligent and poor quality nursing facility and home health care.

AARP regularly collaborates formally and informally with attorneys general to protect older people through systemic reforms to prevent such practices and provide remedies for widespread harm from violations of the law. AARP has come to appreciate the critically important and distinct role that *parens patriae* enforcement actions serve in protecting older people from a myriad of injuries.

AARP is interested in the Court's ruling in this case because of the impact it will have on the ability of state attorneys general to provide robust, efficient and effective enforcement of laws. AARP's participation as amicus curiae will help inform the Court of the fundamental and important differences between private litigation and attorney general enforcement actions, which impact tremendously the lives of some of the most vulnerable residents. If the mass action removal provisions of the Class Action Fairness Act ("CAFA") are applied to *parens patriae* actions, it will have a significant detrimental impact on the interests of older people.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Class Action Fairness Act ("CAFA") does not require and should not be interpreted to permit removal to federal court of *parens patriae* actions asserting only state law claims on behalf of state residents. As fully briefed by the Petitioner, the plain language and purpose of CAFA limit its reach to actions with multiple private plaintiffs, not cases in which the state is the sole plaintiff.

This conclusion is supported by the important substantive, procedural, and remedial differences between public enforcement and private litigation. As *parens patriae*, attorneys general take action to enforce their laws, protect their markets, and apprehend harm, not to represent individuals or vindicate individual interests. The mere fact that private parties may have an interest to protect does not negate the real interest of the state to act in its role as *parens patriae*. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). Indeed, states' sovereign or quasi-sovereign interests, by definition, are interests "apart from the interests of particular private parties." *Id.* at 607 (recognizing the quasi-sovereign interest states have to enforce their laws *on behalf of their residents* is not nominal).

Every state authorizes its attorney general to enforce state laws *on behalf of* the state, its markets, and its residents through *parens patriae* actions. *Id.* (recognizing the "prerogative of *parens patriae* is

inherent in the supreme power of every state"). This authority derives from a state's quasi-sovereign interest in protecting "the health and well-being—both physical and economic—of its residents in general." *Id.* at 607. The unique powers with which states typically endow their attorneys general, but not private litigants, reflect and serve the broader interests they are charged with protecting as *parens patriae*.

Respondents' attempt to characterize *parens patriae* actions as merely disguised private actions should be rejected because it disparages and disrespects the unique and important interests a state protects when acting in its quasi-sovereign capacity to enforce its laws, secure a marketplace free from fraud, and address injuries to its residents:

> [A] State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.

Id., 458 U.S. at 611 (Brennan, J., concurring).

Removal under CAFA merely because restitution—a remedy attorneys general are

authorized by their state legislatures to seek—may flow to residents would increase the state's enforcement costs, thereby interfering with a state's ability to protect its residents.[2] Moreover, treating *parens patriae* actions as class or mass actions creates complicated and potentially intractable doctrinal and logistical issues that will burden states' exercise of their authority and mire the courts in additional litigation.

Attorneys general often are the first and most important defenders of their residents. The health and safety of a state's residents are "primarily, and

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[2] While delay is not a basis to deny removal in a particular case, courts interpreting an act conferring federal jurisdiction must exercise "prudence and restraint in the jurisdictional inquiry" considering "the demands of reason and coherence, and the dictates of sound judicial policy." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810 (1986). *See also Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) ("Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction."); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) ("Exercising federal question jurisdiction over any state law claim that references a federal consumer protection statute would herald a potentially enormous shift of traditionally state cases into federal courts.'") (quoting *Grable*, 545 U.S. at 319).

historically,...matter[s] of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Attorneys general drive life-saving improvements in nursing facilities and home health care. They enforce laws that protect older people's homes, income, and assets. Older people rely on attorneys general to protect them from fraud and scams that threaten their financial security. This Court should not apply CAFA to permit removal of state law *parens patriae* actions to federal court because it would jeopardize a state's ability to protect its quasi-sovereign interests, i.e., its ability to protect its residents.

ARGUMENT

I. *PARENS PATRIAE* ACTIONS ARE FUNDAMENTALLY DISTINCT FROM PRIVATE CLASS AND MASS ACTIONS.

As argued by Petitioner, CAFA does not apply to permit removal of *parens patriae* actions. Respondents' efforts to shoehorn them into a statute that governs private class actions should be rejected. The plain language of CAFA makes clear that CAFA does not, and was not intended to, reach state enforcement actions. This conclusion is supported by the fundamental structural, procedural, and remedial differences between *parens patriae* and private litigation.

A. *Parens Patriae* Actions Are Authorized As Distinct Causes Of Action To Protect Fundamental Public Interests.

Significantly, *parens patriae* actions have only a single plaintiff, the state attorney general, who files in the name of the state *on behalf of* the state and its residents. *See* Miss. Code Ann. § 75-24-9 (2013); *Alfred L. Snapp & Sons*, 458 U.S. at 603-4, 607 ("[I]t must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them."). Although *parens patriae* actions may vindicate rights of individuals, they also stop and deter illegal conduct though injunctions, civil and criminal penalties, damages, or restitution. Individuals who have been or may be victimized by unlawful conduct benefit from all of these forms of relief; they are not, however, themselves plaintiffs. Consequently, a *parens patriae* action is plainly not a mass action, defined by CAFA as "any civil action...in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332 (d)(11)(B)(i).[3]

The distinction is not merely a question of quantity. Enforcement actions that states bring on behalf of residents are fundamentally different than private litigation brought as a class or mass action;

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[3] CAFA's removal provisions apply only to class actions. 28 U.S.C. § 1711(2). A mass actions is "deemed to be a class action" for purposes of removal. 28 U.S.C. § 1332(d)(11)(A).

they employ distinct enforcement mechanisms, vindicate different interests, and are subject to different procedural requirements, elements of proof, and remedies. For example, like other states, Mississippi establishes the attorney general's enforcement authority separately from an individual's private right of action.[4] The Mississippi Attorney General brought this action under Miss. Code Ann. § 75-24-9 (2013) (applicable to attorney general), not Miss. Code Ann. § 75-24-15 (2013) (applicable to private parties).

Moreover, while attorneys general in *parens patriae* actions *protect* individuals, they do not *represent* them in the same manner that private counsel represents clients in mass or class actions. State attorneys general do not have an attorney-client relationship with individual residents, even in cases in which they choose to seek damages or restitution on their residents' behalf. *See* Restatement (Third) of Law Governing Law § 14 (2000).[5] An

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[4] It is notable that the Mississippi Consumer Protection Act expressly prohibits consumers from bringing collective actions. *See* Miss. Code. Ann. § 75-24-15(4) (2013) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person."). It would be anomalous, to say the least, to remove the Attorney General's enforcement action on the grounds that it purportedly constitutes a form of action not even permitted by the law of his state.

[5] Even if attorneys general directly represented individual residents, the question of whether an attorney-client

individual cannot retain or terminate representation by an attorney general, and an attorney general's ethical obligation is to protect the interests of the state. While a private attorney must represent the interest of the individual or class and it would be unethical—and make the attorney inadequate to serve as class counsel—to represent competing interests in a class action an attorney general is required to balance varying interests, and is presumed to represent them adequately. 5 James Wm. Moore *et al.*, *Moore's Federal Practice* § 23.03[4][a][iv][A] (3d ed. 2007). Thus, an attorney general can choose to bring or dismiss claims or seek or drop remedies, such as by settling a case for injunctive relief only, even against the interests or wishes of individuals who may benefit. Unlike in a class action, the individuals are not entitled to notice of the settlement and no fairness hearing is required. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985).

Consequently, individuals who have a right to intervene in federal court cases to protect their interests face an extremely high burden to intervene in or direct the course of *parens patriae* actions. *See* Fed. R. Civ. P. 24(a) ("On a timely motion, the court must permit anyone to intervene who...claims an interest in relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its

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relationship existed—as a matter of law—would not turn on the form of relief sought in each case.

interests, unless existing parties adequately represent that interest."). The Fifth Circuit's holding that individuals are real parties in interest effectively eliminates the standard for intervention and allows individuals to become co-litigants in state enforcement actions as a matter of right.

The fact that attorneys general do not represent individuals who may receive relief—monetary or injunctive—as a result of their *parens patriae* cases not only distinguishes *parens patriae* cases from mass actions covered by CAFA, but demonstrates the substantial legal and procedural difficulties created by treating *parens patriae* cases as mass actions. First, the court would need to select and appoint counsel for these individual plaintiffs, who would not otherwise be represented. In addition, adding individual plaintiffs would contravene settled authority preserving the plaintiff's prerogative, as master of his complaint, to plead the relevant parties, and would effectively require individuals to intervene to obtain relief, contrary to the legislature's pronouncement that individuals may obtain such relief without joining a lawsuit. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon.").

B. States Endow Attorneys General With Distinct Power And Authority Necessary To Act On Behalf Of State Residents.

The difference between *parens patriae* actions and private class actions subject to removal under CAFA, is further demonstrated by the distinct powers that states grant to attorneys general but not private litigants. For example, attorneys general have pre-litigation subpoena power to assist them in investigating and pursuing enforcement actions. Private litigants have no subpoena power without supervision from courts, i.e., without first filing an action, which can be tested to ensure a viable claim before the authority may be exercised.

Attorneys general are further empowered to seek broad injunctive relief on behalf of the public at large. Such relief is paramount to protect state residents broadly by proscribing practices applicable to the entire market, rather than to address merely practices that have harmed a particular group of plaintiffs. Private class representatives, conversely, are not in a position to seek an injunction that applies beyond the interests of the class, and if the class has not yet been certified, injunctive relief is generally available only to class representatives. *See Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 & n.1 (9th Cir. 1983).

The remedies available to attorneys general also set *parens patriae* actions apart from private class or mass actions and make clear their purpose to

serve the states', and not private, interests. States, but not private parties, may seek civil penalties which effectuate the state's interest in ensuring compliance with its laws. Also, every state authorizes attorneys general or another state agency to seek restitution for consumers injured by unfair and deceptive acts and practices. *See* Carolyn L. Carter, *Consumer Protection in the States: A 50-state Report on Unfair and Deceptive Acts and Practices Statutes*, 16, National Consumer Law Center (Feb. 2009). Moreover, attorneys general seeking restitution are not necessarily required to prove individualized ascertainable loss, reliance, or causation. Compare, e.g., Miss. Code Ann. § 75-24-19(b) (2013) (attorney general may establish a civil violation if the court finds that "a person knowingly and willfully used any unfair or deceptive practice, method or act" prohibited by the statute) with Miss. Code Ann. § 75-24-15(1) (2013) (private parties must demonstrate an "ascertainable loss of money or property...as a result of..." a deceptive act or practice).

This broader power to disgorge profits from wrongdoers by requiring them to pay restitution not only restores individuals, in some measure, to the *status quo ante*, but also ensures that illegal conduct is not rewarded, thereby serving the state's sovereign interest in obtaining compliance with law. Thus, the state is not, as Respondents contend, a nominal party with respect to the claim for restitution: the state benefits greatly from this remedy. Moreover, applying the Respondents' logic, individuals would be real parties in interest for all of the state's claims, since individuals are served by injunctive relief and

civil penalties that eliminate current violations of the law and deter future illegal conduct. Respondent's claim-by-claim analysis thus provides no meaningful basis for determining the real parties in interest. Instead, whether the State of Mississippi is a real party in interest should not turn on availability of remedial relief, but rather, whether the state is acting in its sovereign, quasi-sovereign, or proprietary interest. *Alfred L. Snapp & Sons*, 458 U.S. at 602; *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 669 (9th Cir. Nev. 2012) ("Whether a state is the real party in interest in a suit' is a question to be determined from the essential nature and effect of the proceeding.'") (quoting *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981)) (internal quotation marks omitted).

In the same vein, the nature of state law *parens patriae* actions also is not determined by the scope of the underlying conduct. State police powers are not limited to purely intrastate matters, but also extend to national matters that affect state residents. This Court has recognized the propriety of state enforcement actions against, for example, national banks engaged in conduct of a potentially national scope. *See Cuomo v. Clearing House Ass'n*, L.L.C., 557 U.S. 519, 527 (2009) (explaining if a state statute of general applicability is not substantively pre-empted, then "the power of enforcement must rest with the [state]"). Indeed, when states enforce their own laws and allege only state claims to protect state residents, the "claim of sovereign protection from removal arises in its most powerful form." *See Nevada v. Bank of Am. Corp.*, 672 F.3d at 676. Thus,

Respondents' argument that this case is the type of large-scale national case that should be handled in federal court is unavailing. This argument also fails because CAFA by its terms applies only to *class actions* of national importance, not *every* case of national importance.[6] In fact, CAFA explicitly provides an exception to removal of class action cases brought on behalf of the "general public." 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (providing that the term "mass action" does not include any action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such action"). Thus, Congress did not intend for even all class actions of national importance to be heard in federal court.

C. Permitting Removal Of State Law *Parens Patriae* Actions Would Increase Enforcement Costs, Interfere With State Sovereign Interests, And Raise Complex And Potentially Insoluble Logistical And Procedural Problems.

Respondents argue that courts should look behind the face of the pleading, infer on a claim-by-claim basis who receives the benefits of the litigation, and permit removal of those claims that benefit individuals by more than $75,000. *See* 28

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[6] Even if Congress intended some cases of national importance to be heard in federal court, this "Court has recognized that the federal antitrust laws do not pre-empt state law." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989).

U.S.C. § 1332(a); Pet. Br. at 21-23, No. 12-1036 (S. Ct. July 22, 2013). This approach should be rejected for the reasons argued by Petitioner. It also would open a veritable Pandora's Box of logistical problems, causing delay and increased costs that interfere with a state's sovereign interests in protecting its residents in the manner established by state law.

One anomalous result of applying CAFA to *parens patriae* actions on a claim-by-claim basis is that portions of the state's actions would be subject to removal while other claims would not. *See H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000). Respondents do not dispute, for example, that claims other than for restitution are not removable. Additionally, individual claims for less than $75,000 would have to be severed and remanded to state court. *Id.* (noting "the punitive damages claims of the putative class cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement"). Obviously, litigating the same law and facts twice, in two separate courts, increases cost for both parties and unnecessarily wastes governmental and judicial resources. Even if a court could exercise pendant jurisdiction over severed state law claims, the discretion federal courts have to do so will nevertheless result in considerable uncertainty and inconsistent treatment. *See* 28 U.S.C. § 1367(c); *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 165 (1997).

Moreover, increased costs and significant delay will result even if all claims are heard in federal

court. First, the federal court to which a case is removed may be distant and inconvenient to the state. The burden may be especially significant if a case is centralized as part of a Multidistrict Litigation ("MDL") proceeding, as was the private, federal court analog to the underlying case here.[7] The Judicial Panel on Multidistrict Litigation chooses a location based on the convenience to the various litigants *collectively* and on other factors. 28 U.S.C. § 1407. Moreover, MDL consolidation with private actions will not necessarily achieve efficiencies in light of the heightened challenges and burdens private parties face, such as enforceability of arbitration clauses, causation, or reliance, which attorneys general need not address. Removal is therefore likely to result in inevitable delays, to the detriment of states and their residents.

Second, states will be forced to expend additional resources to explain issues of state law to federal court judges, who are both unfamiliar with and unsuited to decide state law issues. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) ("Federal courts lack competence to rule definitely on the meaning of state legislation."); *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar.").

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[7] Because of statutes of limitation, states may proceed with cases against the same or similar defendants at the same time, increasing the chances of MDL consolidation and transfer to a distant federal district.

Moreover, the need to identify and contact individual plaintiffs potentially eligible for monetary relief at the outset of litigation, rather than after the case has been concluded, would increase dramatically the logistical challenges and resource burdens on attorneys general. In fact, the Fifth Circuit acknowledged in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008), the necessity to add plaintiffs to a removed case, leaving determination of the process to the discretion of the lower courts.[8] Courts, naturally, have the authority to make such orders and manage the case, but identifying potential recipients of restitution undeniably will require the expenditure of significant additional resources prior to a finding of liability or any assurance that restitution even will be ordered and ultimately paid by the defendant for distribution.

While residents might be grateful to receive the benefit of restitution or injunctive relief available through *parens patriae* actions, they may be unwilling or unable to serve as active participants in the litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 813 (1985). As a result, even in a case in which more than 100 residents stand to receive relief in the form of restitution, there may not be any individual who would consent to be an actual

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[8] AARP does not suggest that this cumbersome procedure is appropriate. In fact, the absurdity of having to add individuals as separate plaintiffs when they were not parties in the state court illustrates and reiterates that the *parens patriae* action is not merely a private action in disguise.

plaintiff. This would constitute both a windfall to defendants, who potentially would not have to provide relief to absent mass action plaintiffs, and an unwarranted constraint on the ability of attorneys general to exercise their quasi-sovereign interests to protect all of their residents.

Similarly, a majority of the plaintiffs would have to consent in order to centralize a case in a MDL. 28 U.S.C. § 1332(d)(11)(C)(i). As the District Court below noted, this raises questions as to who must consent. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 777 (S.D. Miss. 2012).

To further complicate matters, under such a construction, individuals arguably would be entitled to separate counsel and have procedural rights not available to other residents, particularly those not entitled to receive restitution. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 813. They would be entitled, for example, to seek greater monetary benefits in exchange for reduced injunctive relief. Unlike their counterparts in the same action—such as a state resident or state agency that does not stand to receive restitution—or in other *parens patriae* actions not subject to removal, they also would arguably have the right to notice of a settlement and an opportunity to object. *See id.*

Removal of *parens patriae* actions to federal court is also untenable because it may preclude important relief that only a state court may award. The Anti-Injunction Act, for example, prohibits

federal judges from enjoining state court proceedings. *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). Such injunctions may be necessary to protect states in cases involving widespread fraud on or through the courts, such as demonstrated in state courts nationwide by examples relating to abusive debt collection, foreclosure robo-signing, or state court confirmation of National Arbitration Forum awards.[9] *See e.g.*, Press Release, N.Y. Attorney General, *Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation* (July 22, 2009) (vacating judgments

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[9] In 2009, the Minnesota Attorney General's Office sued the National Arbitration Forum ("NAF")—the nation's largest consumer credit arbitration company at the time—for telling consumers and courts that it independently and neutrally decided consumer credit cases when, in fact, it was affiliated with a private equity fund that owned the debt collector that filed cases with the Forum. The ripple effect of exposing NAF was felt in state courts nationwide. State court actions to confirm arbitration awards issued by NAF were halted and the American Arbitration Association ceased all consumer debt collection arbitration. Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 39-40 (July 2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

because service of process was faulty);[10] *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013), reh'g denied Nos. 11-3814/3961/4016/4019/4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013) (reversing certification of nationwide class action, finding it not superior where state law remedies, including an opportunity to vacate judgments entered in state courts, would provide greater relief to unnamed class members).

These nettlesome problems do not arise in a traditional mass action, in which individual plaintiffs and their counsel together initiate a case, and where the parties, counsel, and procedural avenues are evident and necessary from the start.

D. CAFA Should Not Force States Into The Hobson's Choice Of Forgoing Remedies Or Bearing Increased Burdens.

CAFA should not be applied to permit removal of *parens patriae* actions on a claim-by-claim basis because it forces states into a Hobson's choice (at least for those claims above the amount-in-controversy threshold): avoid removal by forgoing remedies authorized by their state legislature to protect their residents, such as restitution[11] or

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[10] *Available at* http://www.ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new.

[11] It is not clear that the dilemma would be solved by an attorney general dropping a claim for restitution since state

submit to the jurisdiction of the federal courts, where states will bear significant additional unforeseen burdens, abandon important sovereign rights, and obtain potentially inadequate or incomplete remedies that insufficiently deter wrongdoing. Federal courts properly review pleadings to prevent "artful pleading," designed to defeat the jurisdiction of a federal court by disguising a federal claim as a state law claim. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476 (1998) ("If a court concludes that a plaintiff has 'artfully pleaded' claims [by omitting to plead necessary federal questions], it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."). That doctrine simply does not apply here. *See Caterpillar, Inc. v. Williamson*, 482 U.S. 386, 391 (1987) (plaintiff properly may "avoid federal jurisdiction by exclusive reliance on state law"). Where Congress has not preempted the state law claim, as here, the choice of the attorney general to seek restitution or not—or any other claim, or, for that matter, even to bring a case—is committed, to the discretion of the attorney general. *Minnesota v. Worldcom, Inc.*, 125 F. Supp. 2d 365, 373 (D. Minn. 2000) ("In this case, the state's claim for restitution

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statutes may authorize restitution as either a legal or equitable remedy and courts have inherent authority to award equitable remedies such as restitution even where not provided for by statute. Also the mere withholding of a demand for relief does not necessarily govern for purposes of determining the amount in controversy. *See Standard Fire Insurance Co. v. Knowles*. 133 S. Ct. 1345 (2013).

arises solely from state consumer protection laws; that claim does not depend upon the existence of a federal right or immunity as an essential element of the cause of action."). The exercise of that discretion is at the core of the attorney general's authority; it is not a device of pleading.

II. PERMITTING REMOVAL OF *PARENS PATRIAE* ACTIONS WILL HARM OLDER PEOPLE WHO DEPEND UPON ROBUST ATTORNEY GENERAL PROTECTION.

Attorneys general are often referred to as the "first responders" in our law enforcement system. Older people in particular are deeply dependent on their attorneys general, as the state's primary law enforcement officers, to protect their "health and safety." *Medtronic, Inc.*, 518 U.S. at 475.

The panoply of examples in which attorneys general have used their unique positions and powers as *parens patriae* to protect older people demonstrates the important and distinct purpose of *parens patriae* actions. Older people, often directly targeted by unscrupulous businesses and scam artists, are particularly vulnerable to harm that states effectively prevent and substantially remedy through *parens patriae* actions.

A. Attorneys General Have Driven Life-Saving Improvements In Nursing Facilities And Home Health Care.

The lives of older people who live in nursing home or receive significant home-based care may be endangered by inadequate or incompetent care. Unlike with private litigation, such as a wrongful death suit that provides only limited damages to vindicate the individual interest of the person who has died, a *parens patriae* action is effective in securing comprehensive, systemic improvement in care. *See* Marie-Therese Connolly, *Federal Law Enforcement in Long Term Care*, 4 J. Health Care L. & Pol 230, 276 (2002).

For example, a 102-year-old resident of Beverly Enterprises, the nation's largest nursing facility provider at the time, died after suffering from severely infected bed sores due to poor nursing care; another resident died from improper tube-feeding procedures. Press Release, Ca. Office of the Att'y Gen., *Attorney General Lockyer, Santa Barbara D.A Sneddon Announce Major Enforcement Action Against Nation's Largest Nursing Home Chain* (Aug. 1, 2002).[12] To remedy the illegal practices and

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[12] *Available at* http://oag.ca.gov/news/press-releases/attorney-general-lockyer-santa-barbara-da-sned don-announce-major-enforcement. *See also* Press Release, Ca. Office of the Att'y Gen., *Attorney General Lockyer Announces Enforcement Action Against State's Second Largest Nursing Home Chain: Pleasant Care to Pay $1 Million in Fines and Immediately Improve Resident Care* (March 8, 2006), *available*

prevent the reoccurrence of such abuses, the California attorney general obtained a broad injunction that required the company to increase its staff training, achieve adequate staffing levels, develop quality procedures at each facility, and establish a corporate-level compliance program to monitor and ensure that state and federal quality of care standards were met. *Id.*

In a similar vein, attorneys general have acted to ensure that home health care workers receive adequate training[13] and end deceptive marketing and kickback schemes that encourage nursing facilities to use powerful antipsychotic drugs, despite the known increased risk of death to patients.[14] Such critical systemic health reforms were accomplished because the states asserted not merely an individual's interests in obtaining damages but also the interests of the public to safe and adequate care. Though individual patients would have been

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at http:// oag.ca.gov/news/press-releases/attorney-general-lockyer-announces-enforcement-action-against-states-second.

[13] Press Release, N.Y. Att'y Gen., *A.G. Schneiderman Announces $1 Million Settlement With Brooklyn Agency Employing Unqualified Home Health Aides* (June 18, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-1-million-settlement-brooklyn-agency employing-unqualfied.

[14] *See, e.g.* Press Release, Texas Att'y Gen.,*Texas, 36 States Finalize $181 Million Risperdal Settlement with Janssen Pharmaceuticals Inc.* (Aug. 30, 2012), *available at* https://www.oag.state .tx.us/oagnews/release.php?id=4137.

eligible to receive restitution or individual damages in some of these cases, treating such actions as merely mass actions disregards the important state interests that were actually asserted and vindicated and may not have been achievable by private plaintiffs who do not have standing to raise a "generalized grievance" or assert the claims of others.[15] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

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[15] State court standing requirements may differ substantially from federal court requirements. Thus, even if a state court would have jurisdiction over a claim, standing requirements of federal court might preclude raising that claim in federal court. *See Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

B. Attorneys General Are Effective In Halting And Preventing Practices That Threaten Older People's Homes, Income, And Assets.

Many older people continue to work well past traditional retirement age because they do not have sufficient income or assets to meet their most basic needs. Attorneys general work to protect their residents' income by enforcing employment and consumer protection laws. The prospective relief attorneys general can achieve—and not just the restitution—is vital to protect older people.

Oversight of mortgage lending by attorneys general has been vitally important to older borrowers vulnerable to abusive mortgage lending practices and protected older Americans' most important assets—their homes. They were among the first to identify and pursue cases involving predatory mortgage lending practices and have continued to be at the forefront of ongoing enforcement actions. Prentiss Cox, *A New Horizon: Legal Reforms, New Regulatory Models, Predications: The Importance of Deceptive Practice Enforcement in Financial Institution Regulation*, 30 Pace L. Rev. 279, 293-94 (Fall 2009). The most notable—but by no means the only—example is the comprehensive effort against the five largest banks to stop mortgage servicing fraud and abuse. Press Release, Dep't of Justice, *Federal Government And State Attorneys General Reach $25 Billion Agreement With Five Largest Mortgage*

Servicers To Address Mortgage Loan Servicing And Foreclosure Abuses (Feb. 9, 2012).[16]

Other asset-protection actions of attorneys general have been less widely publicized but are vital to protect their residents. For example, attorneys general ensure that state employment discrimination and wage and hour laws are enforced. They also have been at the forefront of preventing and remedying a variety of fraudulent, unfair and deceptive sales and billing practices that threaten the financial security of older people. To protect borrowers from being charged fees and rates that far exceed the state usury limits, attorneys general have attacked credit card and payday lending practices that are illegal under state law. *See* Jessica Silver-Greenberg, *Major Banks Aid in Payday Loans Banned by States*, NY Times (Feb. 23, 2013);[17] Press Release, Pa. Att'y Gen., *Commonwealth Shuts Down Alleged Illegal Web-based "Payday" Lending Scheme; Consumers Have 90 Days to Apply for Restitution* (Sept. 28, 2005).[18]

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[16] *Available at* http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-ag-186.html.

[17] *Available at* http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?pagewanted=all&_r=0.

[18] *Available at* http://www.attorneygeneral.gov/press.aspx?id=670. *See also* Rick Jurgens and Chi Chi Wu, *Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers*, National Consumer Law Center (2007), *available at* http://www.nclc.org/images/pdf/pr-reports/report-fee-harvester.pdf (describing state actions to curb credit cards that offer

Credit practices related to medical debt are a "growing concern particularly for seniors and low and middle income New Yorkers." Press Release, N.Y. Att'y Gen., *A.G. Schneiderman Announces Agreement With GE Capital Retail Bank And CareCredit LLC, Stopping High-pressure Tactics In Health Credit Card Sales To Consumers* (June 3, 2013).[19] The New York Attorney General recently stepped in to protect against deceptive practices of the nation's largest issuer of consumer health care financing, which charges interest of more than 26 percent. *Id.* The settlement includes an appeal process that may result in refunds or credits of up to $2 million to approximately 1,000 consumers whose complaints were initially rejected and "requires significant new protections for consumers." *Id.*

These examples represent merely the tip of the iceberg and demonstrate the importance of respecting the role of attorneys general in protecting the financial security of their residents. As this Court noted in *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. at 529, "[t]he bark remains, but the bite does not" where a federal law intrudes on the state's enforcement of valid state laws."

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minimal credit and extraordinarily high fees); Press Release, N.Y. Att'y Gen., *Sub-prime Credit Card Issuer To Provide $11 Million In Restitution* (July 3, 2006), *available at* http://www.ag.ny.gov/press-release/sub-prime-credit-card-issuer-provide-11-million-restitution.

[19] *Available* at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-ge-capital-retail-bankand-carecredit-llc-stopping.

C. Older People Vulnerable To Fraud And Scams Depend On Attorneys General For Investor Protection.

Older people rely on states to protect them from investment fraud because "state securities authorities play an essential role in the regulation of the U.S. securities industry. State regulators are often the front line of defense against developing problems; they are the 'local cops' on the beat who can quickly detect and respond to violations of law." *Capital Markets and Deregulation Act of 1995: Hearings Before House Subcomm. on Telecom. and Finance Com. on Commerce on H.R. No. 2131*, 104th Cong. 6 (1995) (prepared statement of Arthur Levitt, Chairman, Sec. and Exch. Comm'n).[20]

States wield *parens patriae* authority to protect older people who are vulnerable to the sale of unsuitable, risky, and fraudulent investment products, such as variable annuities and life insurance. "State securities regulators have a long history of protecting investors at the local level day in and day out. Enforcement against fraud is the essence of what state...regulators do—to vigorously pursue sales practice abuses and a variety of scams and frauds against unsuspecting senior investors." *Not Born Yesterday: How Seniors Can Stop Investment Fraud: Hearing Before Sen. Special Comm. on Aging*, 109th Cong. at 25 (2006)

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[20] *Available at* http://www.sec.gov/news/testimony/testarchive/1995/spch069.txt.

(statement of Patricia D. Struck, Pres. NASAA & Wis. Secs. Div. Adm'r),[21] She concluded: "[t]hese are dangerous economic times for seniors. Now, more than ever, all American investors—and especially senior investors—need more, not fewer cops on the securities beat." *Id.* Indeed, the North American Securities Administrators Association ("NASAA") indicates that "states imposed more than $2.2 billion in investor restitution orders and levied fines or penalties and collected costs in excess of $290 million." NASAA Enforcement Section, *NASAA Enforcement Report* 6 (2012).[22]

Frequently, unsuitable life insurance and annuities products are sold through a combination of fraudulent and deceptive practices, complicating the enforcement efforts. In California and Minnesota, for example, the attorneys general uncovered and put an end to "living trust mill [schemes] that tricked senior residents into using their retirement investments to

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[21] *Available at* http://aging.senate.gov/publications/3292006.pdf.

[22] *Available at* http://www.nasaa.org/wp-content/uploads/2012/10/2012-Enforcement-Report-on-2011-Data.pdf. Minnesota, for example has protected older people injured by the deceptive sale of indexed annuities. Fran Lysiak, *Midland National Settles With Minn. Over Unsuitable Sales of Indexed Annuities*, Annuity News.com (Dec. 17, 2008).[22] Each of the nation's top four sellers of indexed annuities have entered into settlements with the Minnesota attorney general regarding allegations that they sold unsuitable deferred equity-indexed annuities by misrepresenting or failing to disclose the terms of these complex retirement-income products. *Id.*

buy annuities that often made less financial sense for the elderly victims but earned the con artists substantial commissions and other income." Press Release, Ca. Office of Att'y Gen., *Attorney General Lockyer Files $110 Million-Plus Lawsuit To Stop Investment Scam That Targets Elderly* (Feb. 10, 2005);[23] Press Release, Minn. Att'y Gen., *Swanson Files Suit Against American Family Legal Plan And Heritage Marketing And Insurance Services* (March 7, 2007).[24] The annuities, which carried a twenty-year maturity date and heavy early withdrawal penalties, were sold to people in their mid-seventies, thereby making unavailable the funds they would need to meet their most basic needs. *Minn. ex. rel Swanson v. Am. Family Prepaid Legal Corp., et al.*, Findings of Fact, Conclusions of Law and Order, Court File No. 27-CV-07-4102 (Minn. 4th J. Dist. Apr. 8, 2010) (awarding over $7 million in restitution and penalties and enjoining numerous practices).[25]

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[23] *Available at* https://oag.ca.gov/news/press-releases/attorney-general-lockyer-files-110-million-plus-lawsuit-stop-investment-scam.

[24] *Available at* http://www.ag.state.mn.us/Consumer/PressRelease/AmericanFamilyLegalPlan.asp. AARP has entered into a confidential settlement in *AARP v. Am. Family Prepaid Legal, et al.*, No. 1:07-CV-202, Document #132 (M.D.N.C. Aug. 9, 2011) (alleging trademark infringement in a "fraudulent scheme to pass off living trusts and financial services to older Americans as AARP-endorsed.").

[25] *Available at* http://www.mnbar.org/sections/elder-law/newsletters/2010-11/AFLP%20-%20Final%20Order.pdf.

Attorneys general provide vital protection to older people, not merely in recovering monetary benefits, but also in preventing ongoing harm and ensuring a safe marketplace. Respondents' assertion that CAFA permits removal of *parens patriae* actions on a claim-by-claim basis, which would have permitted removal of the cases described above and disparages and disrespects the important protection that attorneys general provide on behalf of all their residents, should be rejected.

CONCLUSION

For the reasons stated above, AARP respectfully urges this Honorable Court to hold that *parens patriae* cases brought by attorneys general are outside the scope of CAFA's removal provisions and to vacate the judgment of the Fifth Circuit Court of Appeals denying remand of the instant *parens patriae* action to state court.

JULY 29, 2013

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1036

In the
Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE ACCESS TO COURTS INITIATIVE, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Access to Courts Initiative (ACI) is an advocacy organization dedicated to promoting the common interests of its members in fair and expeditious access to the federal courts for resolving interstate disputes, as envisioned by those who framed and ratified Article III, section 2 of the Constitution.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici believe that an unduly constrained view of federal jurisdiction has helped fuel the litigation explosion of the last fifty years, contributing to the imposition of billions of dollars of costs on American consumers, the loss of hundreds of thousands of American jobs, reduced foreign investment, increased medical costs, and fewer potentially lifesav-

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel, make a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6; *id.* 37.3(a).

ing medical products being made available to the public. Several of Amici's officers and members were involved in the coalition that promoted enactment of the Class Action Fairness Act ("CAFA"), the jurisdictional statute at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III was designed to establish a federal judiciary "competent to the determination of matters of national jurisdiction." THE FEDERALIST No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Framers, apprehensive of actual or perceived state court bias in favor of local interests, considered a neutral federal tribunal necessary in some cases to the peace and harmony of the union, and they took care to extend federal jurisdiction to "cases in which the State tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 478 (Hamilton). In particular, Article III, Section 2 mandates that "[t]he judicial Power shall extend to," among other things, "Controversies between two or more States;—*between a State and Citizens of another State*;—*between Citizens of different States*;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

Thus, although the Framers generally left undisturbed the jurisdiction of state courts over cases arising under state law, they established concurrent jurisdiction in federal courts over cases in which the

impartiality of state courts would be most directly tested: those cases in which the interests of the State itself, or its citizens, were adverse to the interests of other States, foreign countries, or their citizens. Of particular concern to the Framers in establishing federal jurisdiction over such disputes was the crippling effect that judicial bias favoring in-state interests, whether real or perceived, would have on interstate commerce. By ensuring that a neutral federal forum was available in such cases, the Framers were animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* § 10; art. IV, § 2, cl. 1.

Whether this case is viewed as a *parens patriae* action on behalf of the State alone or as an action on behalf of a host of Mississippi citizens as the real parties in interest, it is indisputably either a controversy "between a State and Citizens of another State" or a controversy "between Citizens of different States." It is therefore squarely within the clear text of Article III providing that the judicial power of the United States "shall extend" to just such controversies. These constitutional provisions were not intended "to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

Petitioners contend, however, that CAFA, the removal statute at issue here, should be interpreted

with a presumption against federal jurisdiction. Because the State is at least a nominal plaintiff, Petitioner argues, construing CAFA to interfere "with the State's authority to pursue actions in its own courts under its own laws ... would risk trampling on the sovereign dignity of the State." Pet. Br. at 12. Amici States, likewise, assert that CAFA should be narrowly construed because removal of a case brought by a State under its own laws in its own courts "is an affront to established principles of federal-state comity." Br. of Ill., *et al.* at 5-6.

But, as we demonstrate in detail below, it is precisely this type of case—one brought by a State or its citizens *against citizens of other States*—that the Constitution expressly brings within the jurisdiction of the federal courts, the "tribunal[s] which, having no local attachments, will be likely to be impartial between the different States and their citizens." THE FEDERALIST No. 80, at 478 (Hamilton). We are aware, of course, that neither Congress nor this Court has interpreted Article III to *require* that federal jurisdiction extend to every case or controversy falling within the language of Article III, and our purpose here is not to ask this Court to revisit this longstanding interpretation. But in light of the plain language of Article III specifically extending federal jurisdiction to controversies such as this one and the important purposes such jurisdiction was intended to serve, we submit that CAFA should, at a minimum, be interpreted without any presumption against removal. Indeed, it should be interpreted generously, with a presumption *favoring* removal, to effectuate the constitutional design.

ARGUMENT

I. This Case Falls Squarely within the Central Purpose of Article III's Diversity Provisions—To Provide a Neutral Federal Tribunal for Resolving Interstate Disputes.

Article III provides that the federal "judicial Power shall extend ... to Controversies ... between a State and Citizens of another State [and] between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1. The history of the framing and ratification of these diversity clauses makes clear that they were designed to ensure that a case brought by a State or its citizens against a citizen of a different State could be litigated in a presumably neutral federal court rather than in a possibly biased state court. It is undisputed that this case is brought by either the State of Mississippi or its citizens against citizens of other States. It thus falls squarely within the language of Article III and the purposes for which the diversity clauses were adopted.

1. Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and corresponding distrust. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). The Framers well understood that if the fledging nation was to succeed, it would have to overcome these tendencies. The new national government was thus given ultimate legislative power over the regulation of interstate commerce, the citizens of each State

were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts. *See* U.S. CONST. art. I, §§ 8, 10; art. IV, § 2. The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling individuals, investors, and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated, diversity jurisdiction went hand-in-hand with other constitutional provisions designed to foster development of a truly national economy and identity.

The call for federal diversity jurisdiction first appeared in the Constitutional Convention on May 28, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph. *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 475, 477 (2010). The Virginia Plan lacked a grant of general subject matter jurisdiction over disputes arising under federal law, favoring instead specific grants of jurisdiction over the collection of national revenue, the impeachment of national officers, certain maritime criminal and property matters, and disputes involving "foreigners or citizens of other States." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand ed., 1911) ("FARRAND'S RECORDS"). The Virginia Plan also proposed to vest federal courts with juris-

diction generally over all "questions which may involve the national peace and harmony." *Id.*

On June 13, 1787, Randolph moved to boil down the resolution to its essence, leaving to a subcommittee "the business of ... detail[ing] it" in specific terms. *Id.* at 238. Apart from revenue collection and impeachment, all of the Virginia Plan's other specific jurisdictional grants were subsumed, Randolph explained, in the "national harmony" provision at its conclusion. It is thus clear that the disputes involving foreigners or citizens of other States referenced by the initial proposal were considered a species of those "questions which involve the national peace or harmony," and that the judiciary's function of protecting "the harmony of states and that of the citizens thereof" would be preserved by that provision. *Id.*

Not until July 18 did the Convention adopt a proposal extending federal jurisdiction to "cases arising under laws passed by the general Legislature." 2 FARRAND'S RECORDS 39. This provision, combined with the provision concerning cases "involv[ing] the national Peace and Harmony," was then taken up by the Committee of Detail. *Id.* at 132-33. In keeping with Randolph's expectation, the Committee provided the "detail[s]" of federal jurisdiction, eliminating the general language regarding cases of "national peace and harmony" and replacing it with specific jurisdictional grants over particular types of cases, including "Controversies between ... a State and a Citizen or Citizens of another State, [and] between Citizens of different States." *Id.* at 173. These proposed jurisdictional grants over interstate disputes,

with only slight stylistic modification, ultimately became the diversity clauses at issue here.

2. When the Convention adjourned and sent the new Constitution to the States for ratification, the Antifederalists argued that the proposed federal judiciary would "utterly annihilate ... state courts." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1901) ("ELLIOT'S DEBATES") (George Mason); *see also id.* at 527. The diversity clauses would result, they argued, in ordinary citizens being forced to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals had to be taken to the faraway Supreme Court. *See, e.g., id.* at 526 (Mason); 4 ELLIOT'S DEBATES 138-39 (Samuel Spencer).[2]

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[2] The Antifederalists also contended that Article III's provision for federal jurisdiction over controversies "between a State and Citizens of another State" would subject States to suit without their consent, abrogating traditional principles of sovereign immunity. *See, e.g.*, 3 ELLIOT'S DEBATES 526-27 (Mason); FEDERAL FARMER NO. 3, Oct. 10, 1787, *reprinted in* 2 THE ANTIFEDERALIST 234, 245 (Herbert Storing ed., 1981); BRUTUS NO. 13, Feb. 21, 1788, *reprinted in* 2 THE ANTIFEDERALIST 428, 429-31. Leading advocates of the Constitution responded that this provision would not abrogate the States' sovereign immunity but would authorize only suits brought by States *against* citizens of other States and suits by such citizens against States *that had consented to suit*. *See, e.g.*, 3 ELLIOT'S DEBATES 533 (James Madison); *id.* at 555-56 (John Marshall); THE FEDERALIST NO. 81, at 487-88 (Hamilton); *Alden v. Maine*, 527 U.S. 706, 715-19 (1999).

The leading advocates of federal jurisdiction over interstate disputes included some of the leading Framers. James Madison defended diversity jurisdiction by succinctly stating its obvious rationale:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

3 ELLIOT'S DEBATES 533. Madison maintained that the specific constitutional provision for suits brought by States against citizens of other States would likewise "give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." *Id.*

John Marshall placed these points in larger context, echoing Randolph's argument at the Constitutional Convention that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

> To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case be-

> tween North Carolina and Virginia. Would not the refusal of justice to our citizens, from the Courts of North Carolina, produce disputes between the states?

Id. at 557.

James Wilson likewise defended the Constitution's grant of jurisdiction over interstate and international disputes: "[I]s it not necessary, if we mean to restore either public or private credit," asked Wilson, "that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?" 2 ELLIOT'S DEBATES 491. Indeed, Wilson saw diversity jurisdiction as essential to the "important object [of] extend[ing] our manufactures and our commerce." *Id.* at 492. Wilson also provided a robust defense of the specific constitutional provision authorizing suits *"[b]etween a state and citizens of another state," id.* at 491:

> When this power is attended to, it will be found a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.

Id.[3]

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[3] Less prominent supporters of the Constitution like-

The most influential defense of the new federal judiciary, however, was provided by Alexander Hamilton in his classic series of essays on Article III in the *Federalist Papers*. In *Federalist No. 80*, Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial and unbiased." *Id.* at 475. As he explained:

> No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

Id. at 478.

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wise defended the diversity clauses. In the North Carolina convention, for example, William Davie, who had attended the Constitutional Convention, defended federal jurisdiction over controversies "between a state and citizens of another state" on the ground that federal "jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states." 4 ELLIOT'S DEBATES 159. As Davie explained, "It is impossible that there should be impartiality when a party affected is to be judge." *Id.* Davie argued that "[t]he security of impartiality" was likewise "the principle reason for giving up the ultimate decision of controversies between citizens of different states" and that diversity jurisdiction was "essential to the interest of agriculture and commerce." *Id.*

As Hamilton further elaborated, "in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens." *Id.* As Hamilton explained, only "that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." *Id.* Like Marshall and Randolph, Hamilton also emphasized that "[t]he power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is ... essential to the peace of the Union." *Id.* at 477; *see also id.* at 475, 480.

3. This Court has consistently confirmed this understanding of the purpose of the diversity clauses. In one of its earliest examinations of diversity jurisdiction, the Court stated:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controver-

> sies between aliens and a citizen, or between citizens of different states.

Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds, Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); *see also, e.g., Martin*, 14 U.S. (1 Wheat.) at 347 ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

This Court has likewise acknowledged that by ensuring that a neutral federal forum was available for adjudicating disputes between a State or its citizens and citizens of other States, those who framed and ratified Article III sought to preserve national harmony and promote interstate commerce. Federal jurisdiction

> is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war.

Georgia v. Pa. R.R. Co., 324 U.S. 439, 450 (1945) (internal citations omitted). Because the Constitution barred these "traditional methods" to the States, federal jurisdiction over controversies between States and between a State and citizens of another State "was provided as an alternative." *Id.* And, in the words of Justice Joseph Story, "Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1685 (1833).

In short, whether the true plaintiff in this controversy is Mississippi, its citizens, or some combination of the two, this case falls squarely within the purposes for which federal diversity jurisdiction was established.

II. Article III Provides that Federal Jurisdiction "Shall Extend" to Controversies Such As This One.

Article III provides that "[t]he judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added). Article III likewise directs that "[t]he judicial Power *shall extend*" to various enumerated categories of cases and controversies, including "Controversies ... between a State and Citizens of another State [and] between Citizens of different States." *Id.* § 2, cl. 1 (emphasis added). On its face, this unequivocal language plain-

ly counsels against narrowly construing a jurisdictional statute, such as CAFA, not to extend to a case falling squarely within the clear language of Article III.

1. In his landmark opinion in *Martin v. Hunter's Lessee*, Justice Story forcefully argued that "[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation." 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

Just as Section 1 of Article III provides that the federal judicial power "*shall be vested* (not may be vested)" in a supreme court and congressionally established inferior courts, Justice Story noted, it also provides that "[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." *Martin*, 14 U.S. (1 Wheat.) at 328. Justice Story argued that "[t]he language, if imperative as to one part, is imperative as to all." *Id.* at 330. Congress thus may no more refuse to vest the judicial power than it may "create or limit any other tenure of the judicial office" (besides tenure "during good behaviour") or "refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office." *Id.* at 328-29.

Justice Story also noted that the language of Article III vesting the judicial power mirrors that of Articles I and II:

> The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

Id. at 329-30; *see also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 842 (1984).

Justice Story then turned to the language of Section 2 providing that "the judicial power *shall extend*" to the enumerated cases and controversies. *Martin*, 14 U.S. (1 Wheat.) at 331. These words too, said Justice Story, are "used in an imperative sense," and "import an absolute grant of judicial power." *Id.*

Thus, he urged, the "duty of congress to vest the judicial power of the United States" must be understood as "a duty to vest the *whole judicial power*," else "congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all." *Id.* at 330.

In short, the plain language of Article III, Justice Story concluded, makes clear that the federal "judicial power shall extend to all the cases enumerated in the constitution." *Id.* at 333; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) ("The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish." (emphasis added)).

2. While Justice Story's mandatory view of federal jurisdiction has not prevailed, *see infra* at 26-30, amici respectfully submit that his textual analysis has great force and has never been satisfactorily answered. To be sure, after identifying the classes of cases and controversies to which the judicial power shall extend and prescribing the Supreme Court's original jurisdiction, Article III provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." *Id.* § 2, cl. 2 (emphasis added). Given that Article III appears to commit the creation of inferior federal courts to Congress's discretion, this Exceptions Clause could be understood to permit Congress to defeat the judicial power over certain cases or controversies simply by

excepting them from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters.

Whatever force this reading might have if the Exceptions Clause is viewed only in conjunction with Congress's apparent discretion regarding the creation of inferior federal courts, it is in undeniable tension with Article III's dual commands that the judicial power "shall be vested" in the Supreme Court and congressionally created inferior courts and that this power "shall extend" to the cases and controversies identified in Section 2. Article III should be read as a whole in a manner that gives effect to all of its provisions, and any reading of some of its provisions that would render others meaningless should be avoided if reasonably possible.

Such a reading is clearly possible: although the provisions of Article III vesting and extending the federal judicial power require that the *entire* judicial power be vested *somewhere* in the federal judiciary, Congress's authority over the inferior Courts and its ability to make exceptions to the Supreme Court's appellate jurisdiction give Congress substantial discretion over where in the federal judiciary that power is vested. Thus, Congress may choose not to grant inferior federal courts jurisdiction over certain cases or controversies enumerated in Article III (or may even choose not to create inferior federal courts at all), so long as the Supreme Court retains appellate jurisdiction over any cases or controversies not cognizable in the inferior federal courts. Alternatively, Congress may except certain enumerated cases or controversies from the Supreme Court's appel-

late jurisdiction, so long as it creates inferior federal courts with jurisdiction over those matters. But Congress may not, consistent with this reading of Article III, remove any of the enumerated cases or controversies from the federal judiciary entirely, *both* by excepting it from the Supreme Court's appellate jurisdiction *and* by declining to create an inferior federal court with jurisdiction to consider it. As summarized by Alexander Hamilton in *Federalist No. 82*, "[t]he evident aim of the plan of the convention is that *all* the causes of the specified classes shall, for weighty public reasons, receive their *original or final* determination in the courts of the Union." THE FEDERALIST No. 82, at 494 (Hamilton) (emphasis added); *see also, e.g.*, *Martin*, 14 U.S. (1 Wheat.) at 333 ("The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.").

This reading of Article III both respects its mandatory language vesting and extending the federal judicial power and serves its central purposes, including providing a neutral tribunal for resolving "cases in which the State tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 478 (Hamilton). And it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress's evident control over the existence of inferior federal tribunals and with the express terms of the Exceptions Clause.

Further, this reading is completely consistent with the justification for the constitutional provisions regarding inferior federal courts advanced by leading Framers of the Constitution. *See, e.g.*, THE FEDERALIST No. 81, at 485 (Hamilton) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance."); 1 FARRAND'S RECORDS 124 (Madison) ("[U]nless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree.") And it is truer to the plain language of the Exceptions Clause—which by its terms grants Congress power to make exceptions only to the "*supreme Court*['s] *appellate Jurisdiction*," not to "[*t*]*he judicial Power of the United States*"—than is the alternative reading, which would allow Congress to remove broad classes of cases and controversies from the federal judicial power entirely. *See, e.g.*, CROSSKEY, *supra*, at 616.[4]

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[4] Some have argued that Article III establishes mandatory federal jurisdiction over some of the classes of cases and controversies it identifies (such as cases arising under the Constitution, laws, and treaties of the United States), but not over others (such as controversies between States and citizens of other States or between citizens of different States). Indeed, Justice Story suggested such a distinction in *Martin* itself, albeit in dicta upon which he did not "place any implicit reliance." 14 U.S. (1 Wheat.) at 336. As Justice Story noted, by its terms, Section 2 extends some heads of federal judicial power to "all cases" but extends others only to "controversies," not "*all* controversies." *Id.* at 334. "From this difference of phraseology," he surmised, "perhaps, a difference of constitutional intention may, with propriety, be inferred." *Id.* "In respect to the first class," Justice Story suggested,

> it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

Id. Justice Johnson, in a separate opinion, answered this argument:

> "Shall extend to controversies," appears to me as comprehensive in effect, as "shall extend to all cases." For, if the judicial power extends "to controversies between citizen and alien," &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to *all controversies*.

Id. at 375.

Furthermore, it appears that at the time the Constitution was drafted and ratified, the term "cases" was understood to include both criminal and civil cases, while the term "controversies" was understood to denote civil cases only. *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J.); 1 BLACKSTONE COMMENTARIES App. 420 (St. George Tucker ed., 1803). Accordingly, it seems likely that Article III uses the term "cases" to refer to both civil and criminal judicial proceedings, but uses the term "controversies" to refer more narrowly only to civil proceedings. *See, e.g.*, CROSSKEY, *supra*, at 614; John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 220 (1997). Indeed, as discussed below, the Constitutional Convention's Committee on Detail rejected a proposal that would have made federal question jurisdiction mandatory but diversity jurisdiction subject to congressional regulation. *See infra* at 22.

III. A Mandatory Reading of Article III Is Supported by the History of Its Framing and Ratification.

Justice Story's conclusion—that the plain text of Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—is also supported by the historical evidence from the Constitutional Convention and the ratification debates.

1. As discussed above, *see supra* at 7-8, much of the specific language of Article III was developed by the Committee of Detail. Accordingly, it bears emphasis that this committee specifically considered and rejected a draft proposal that would have extended federal jurisdiction "1. to all cases, arising under laws passed by the general Legislature[,] 2. to impeachments of officers, and 3. to *such* other cases, *as the national legislature may assign*, as involving the national peace and harmony, [*inter alia*] in disputes between citizens of different states [and] in disputes between a State & a Citizen or Citizens of another State." 2 FARRAND'S RECORDS 146-47 (last emphasis added). The committee thus "considered and then rejected a proposal which would have given Congress power to particularize the jurisdiction" of the federal courts. Clinton, *supra*, at 773.

On August 6, 1787, the Committee of Detail reported a draft constitution to the Convention. After providing in its first section that "[t]he Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States," and providing

in its second section for tenure "during good behaviour" and undiminished compensation, this draft identified the scope of the federal jurisdiction in a third section as follows:

> The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior

> Courts, as it shall constitute from time to time.

2 FARRAND'S RECORDS 186-87.

On August 27, the Convention made a number of important amendments to this draft provision, three of which strongly suggest that although Congress could allocate the judicial power between the Supreme Court and any inferior federal courts it chose to create, it could not eliminate all federal jurisdiction over any of the specified cases and controversies. Perhaps most importantly, the Convention considered and rejected a motion to insert, after the specification of the Supreme Court's original jurisdiction, language providing that "[i]n all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct." *Id.* at 425, 431. Thus, the delegates considered but rejected a proposal that would have explicitly permitted broad legislative control over federal jurisdiction. As one commentator has observed, "A clearer rejection of congressional authority over judicial powers is hard to imagine." Clinton, *supra*, at 791.

The Convention next voted unanimously to strike the entire last sentence of this section, which would have authorized Congress to "assign any part of the jurisdiction above mentioned ... in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." *See* 2 FARRAND'S RECORDS 425, 431. Any inference that this language may have granted Congress authority to curtail federal jurisdiction was thus eliminated.

To be sure, the Convention did not eliminate the provision authorizing Congress to make exceptions to the Supreme Court's appellate jurisdiction. It did, however, change the draft language at the beginning of the section that would have extended "*the jurisdiction of the Supreme Court*" to the enumerated cases and controversies to provide instead that "*[t]he Judicial Power*" shall extend to these cases and controversies. *Id.* at 425, 431 (emphasis added). These amendments strongly suggest that the Exceptions Clause was understood by its framers to authorize exceptions only to the Supreme Court's appellate jurisdiction, not to the federal judicial power as a whole.

2. The state ratification debates likewise support a mandatory reading of Article III. Indeed, "the antifederalist attacks on the breadth of the judicial power of the United States prescribed by the Constitution and on the costs, inconvenience, and potential threat to state courts posed by article III produced almost no suggestions by federalists that Congress could delimit the sphere of federal court jurisdiction." Clinton, *supra*, at 810. To the contrary, as discussed above, *see supra* at 19, leading Framers and supporters of the proposed Constitution, including Alexander Hamilton, acknowledged that the federal jurisdiction set forth in Article III was mandatory, *see, e.g.*, THE FEDERALIST No. 82, at 494 (Hamilton); THE FEDERALIST No. 81, at 485 (Hamilton).

Furthermore, the Antifederalists proposed amendments in the state ratifying conventions that ranged from abolishing diversity jurisdiction alto-

gether, to eliminating original diversity jurisdiction in cases at common law, to restricting it to cases involving a minimum amount in controversy. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 499-503 (1928). That the Antifederalists uniformly sought to achieve these goals by constitutional amendment reflects a common understanding that such restrictions could not be enacted by statute. None of the amendments designed to restrict the scope of federal jurisdiction, including diversity jurisdiction, succeeded in the First Congress. To the contrary, "the Federalists won a complete victory." *Id.* at 503.

3. We recognize, of course, that the First Congress did not fully vest in the federal courts all of the cases and controversies enumerated in Article III. For example, the Judiciary Act of 1789 limited diversity jurisdiction to cases in which the amount in controversy exceeded five hundred dollars. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. The first Judiciary Act also limited diversity jurisdiction to controversies where one of the parties was a citizen of the State where the suit was brought and barred jurisdiction over suits brought by the assignee of "any promissory note or other chose in action," except "foreign bills of exchange" unless the federal courts would have had jurisdiction "if no assignment had been made." *Id.* Removal jurisdiction was likewise subject to a five hundred dollar amount-in-controversy requirement and was limited to cases where the defendant was a citizen of a State other than that where the action was brought. *See id.* § 12, 1 Stat. at 79-80.

In addition, consistent with the language of Article III, the first Judiciary Act vested the Supreme Court with "original but not exclusive jurisdiction" over "all controversies of a civil nature ... between a state and citizens of other states, or aliens," *id.* § 13, 1 Stat. at 80. That Act did not, however, establish concurrent jurisdiction over such controversies in any other federal court, nor did it provide for removal to federal court or for federal appellate review of such suits if commenced in state court. *See Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 516-17 (1898). These omissions from the Judiciary Act cannot be squared with the indisputable principle that the federal "judicial power ... was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum." *Martin*, 14 U.S. (1 Wheat.) at 348.

While these limitations imposed by the First Congress constitute "weighty evidence of [the] true meaning" of Article III and, therefore, of congressional authority to control the jurisdiction of the federal courts, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), they are hardly dispositive. There is substantial evidence that "in the First Congress, certain of the Constitutional provisions relating to these matters [federal jurisdiction] were not scrupulously regarded." CROSSKEY, *supra*, at 618; *see generally* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986). Indeed, the First Congress's com-

pliance with Article III was demonstrably imperfect in at least some respects. For example, Congress plainly exceeded its constitutional authority, perhaps inadvertently, in purporting to extend federal jurisdiction to all cases, subject to a jurisdictional minimum, in which "an alien is a party." Judiciary Act of 1789, § 11, 1 Stat. at 78. This Court narrowly interpreted this provision to apply only "to suits *between citizens and foreigners*" in order to reconcile it with the plain language of Article III. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *see also Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). And, of course, the First Congress improperly attempted to expand the original jurisdiction of this Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) at 173-76.

4. We also acknowledge that this Court implicitly upheld the constitutionality of one of the First Congress's statutory limitations on diversity jurisdiction not long after it was adopted. In *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), an assignee challenged the provision restricting jurisdiction in cases of assignment on the ground that its suit was "between citizens of different states," as prescribed by Article III, and that the statute "imposed a limitation upon the judicial power, not warranted by the constitution." *Id.* at 9; *see also id.* (arguing that "congress can no more limit, than enlarge the constitutional grant"). Although the Court's opinion did not address this argument, it relied on the statute in holding that the circuit court lacked jurisdiction over the case. *Id.* at 10. The Court thus implicitly held that this limitation on the jurisdiction prescribed by Article III was constitutional. The re-

port of this decision, moreover, records the following statement by Justice Chase, a former antifederalist, during oral argument:

> The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise[;] and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.

Id. at 9 n.a. A half century later, this Court relied on this comment in expressly upholding the constitutionality of the same statutory limitation. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

Later still, this Court upheld Congress's partial provision for federal jurisdiction over suits between a State and citizens of other States, specifically rejecting the argument that "the judicial power of the United States ... cannot be so distributed that a state court may take cognizance of a case or controversy to which that power is extended, if its determination thereof is not made by congress subject to re-

examination by some court of the United States." *Plaquemines Tropical Fruit*, 170 U.S. at 513; *see also id.* at 516-17, 520-21. Further, this Court has rejected the view that it "must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another even though the dispute may be one over which this Court does have original jurisdiction." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971). Indeed, despite its indisputable constitutional and statutory jurisdiction over such cases, this Court has sometimes declined to hear them even when the only alternative is litigation in state court without opportunity for removal or federal appellate review. *See id.* at 495, 498 n.3.

Regardless of whether these precedents upholding congressional authority to curtail federal jurisdiction can be reconciled with the text, history, and purposes of Article III, it is unnecessary to revisit them to reject Petitioner's claim that principles of federalism require a presumption against federal jurisdiction over a case falling squarely within Article III's scope. Amici urge only that these precedents not be extended or somehow construed to support a grudging view of federal jurisdiction that would be inimical to the text of Article III and its core purposes.

IV. A Presumption Against Removal Under CAFA Would Contradict the Constitutional Design.

Any presumption against removal in a case, such as this one, brought by a State or its citizens

against citizens of other States, would run flatly contrary to the constitutional design. At a minimum, then, the jurisdictional provisions of CAFA should be interpreted without any thumb on the scale against removal. Indeed, these provisions should be interpreted generously, to effectuate the important purposes underlying the diversity clauses.

1. Petitioner, however, argues that "[d]ue regard for the rightful independence of state governments" mandates "a policy of 'strict construction' of removal statutes." Pet. Br. 27. In support of this purported "policy," Petitioners invoke dictum in this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).[5] This dictum rested on inferences drawn by the Court from its contemporaneous understanding of "Congressional purpose [and] policy" reflected in the removal statutes as they existed at the time. 313 U.S. at 108. But as this Court has subsequently recognized, "whatever apparent force this [reasoning] might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003). This Court has thus squarely rejected the *Shamrock Oil*

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[5] Like the courts of appeals rejecting federal jurisdiction in cases similar to this one, Petitioners also invoke dicta in subsequent cases repeating the *Shamrock Oil* dictum. *See* Pet. Br. at 27-28 (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002), and *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002)); *see also Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta*); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (same).

dictum, holding instead that "whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Id.* at 698.

In all events, any reliance on a supposed congressional policy requiring strict construction of removal statutes is especially inappropriate in this case. In enacting the statute at issue here, Congress acted to redress state court litigation "[a]buses" that had

> undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are [*inter alia*] keeping cases of national importance out of Federal court[, and] sometimes acting in ways that demonstrate bias against out-of-State defendants ....

CAFA, § 2(a)(4), Pub. L. 109-2, 118 Stat. 4, 5. CAFA was thus intended to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2). In light of these congressional findings and purpose, it is not surprising that, in enacting CAFA, Congress expressly rejected any presumption against removal. As the CAFA Senate report explains, "there is no such presumption. In fact, the whole purpose of diversity jurisdiction is to preclude any such presumption by allowing state-law based claims

to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field and thereby protect interstate commerce interests." S. REP. NO. 109-14, at 57 (2005).

More fundamentally, any general presumption against removal is fundamentally at odds with the text, history, and purposes of Article III, as demonstrated above. As this Court has explained before,

> the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907).[6]

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[6] It is true, of course, that the burden of persuasion for establishing diversity jurisdiction—or any other type of federal jurisdiction—is borne by the party asserting it. *See, e.g., Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2009). Contrary to Petitioner's apparent suggestion, *see* Pet. Br. at 28 (citing *Hertz Corp.*), this unremarkable rule means only that the party invoking federal jurisdiction must allege (and, if its allegations are controverted, prove) *facts* establishing federal jurisdiction. In no way does this rule speak to how the *law* governing removal should be interpreted, let alone support an interpretive presumption against removal.

2. Echoing court of appeals decisions denying federal jurisdiction in cases similar to this one, Petitioner also invokes this Court's statement in *Franchise Tax Board v. Construction Laborers Vacation Trust* that "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." 463 U.S. 1, 21 n.22 (1983), (quoted in Pet. Br. at 31); *see also Bank of Am. Corp.*, 672 F.3d at 676 (quoting *Franchise Tax Bd.*); *LG Display Co.*, 665 F.3d at 774 (same); *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392 (4th Cir. 2012) (following *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (2011)); *McGraw*, 646 F.3d at 179 (quoting *Franchise Tax Bd.*). This Court's statement, buried in a footnote and unsupported by citation or argument, is, however, the purest of dictum. Furthermore, the text and purposes of Article III make plain that cases brought by States against citizens of other States are within the federal jurisdiction. Accordingly, any presumption against removal of such a case based solely on the fact that the State is a plaintiff turns the constitutional design on its head. To the extent the *Franchise Tax Board* dictum suggests such a presumption, this Court should repudiate it.

3. Nor do sovereign immunity principles in any way support a presumption against removal of a suit brought by a State against citizens of other States. *See* Pet. Br. 29-31. As a textual matter, the Eleventh Amendment's language—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against* one of the United States" (em-

phasis added)—does not speak to, let alone limit, Article III's grant of jurisdiction over a suit brought *by* "a State" *against* "Citizens of another State," U.S. CONST. art. III, § 2, cl. 1. The Eleventh "amendment, therefore, extend[s] to suits commenced or prosecuted by individuals, but not to those brought by States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821). Nor is sovereign immunity implicated by federal removal of a suit commenced by a State in its own court against a citizen of a different State. As this Court explained in upholding its jurisdiction over an appeal of a state court decision by an individual appellant:

> If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court ....

Id. at 409. Significantly, this Court has followed *Cohens* and invoked the same analysis in rejecting the claim that the "constitution exempts the states from [the] operation" of the removal statutes in a suit commenced by a State against private citizens. *Ames v. Kansas*, 111 U.S. 449, 470 (1884).[7]

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[7] Although Petitioner quotes a number of this Court's abstention cases, *see* Pet. Br. 31-33, it does not make any serious attempt to show that this case satisfies the elements of any established abstention doctrine, nor could it do so. And regardless of whether this case involves "open questions" of state law

* * *

In short, a presumption against removal in this case—either in general or because the State is at least a nominal plaintiff—cannot be squared with the plain text and fundamental purposes of Article III. Accordingly, this Court should interpret CAFA's removal provision fairly, without any thumb on the scales against removal, for in the words of Chief Justice Marshall,

> The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

Deveaux, 9 U.S. (5 Cranch) at 87; *see also Cohens*, 19 U.S. (6 Wheat.) at 404 ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. ... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that

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that Petitioner wishes the state courts "to articulate," *id.* at 32-33, "difficulties and perplexities of state law are no reason for referral of the problem to the state court," *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 673 n.5 (1963).

which is not given. The one or the other would be treason to the constitution.").

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that this Court should, at a minimum, construe the jurisdictional provisions at issue in this case without any presumption against removal. Indeed, given that this case falls squarely within the scope of the Constitution's jurisdictional provisions, we submit that the statute here should be construed generously to effectuate the important purposes for which those who framed and ratified Article III established diversity jurisdiction.

Respectfully submitted,

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September 10, 2013

AMICUS CURIAE BRIEF

No. 12-1036

In The
Supreme Court of the United States

STATE OF MISSISSIPPI
ex rel. JIM HOOD, ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* ALLSTATE INSURANCE COMPANY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When a state attorney general brings a civil action asserting restitution claims under state law on behalf of thousands of private purchasers to "restore to any person in interest" the money they allegedly overpaid, are the injured persons the real parties in interest to those restitution claims, and therefore is the action one "in which monetary relief claims of 100 or more persons are proposed to be tried jointly" under the Class Action Fairness Act?

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INTEREST OF *AMICUS CURIAE*[1]

Allstate Insurance Company ("Allstate"), with its subsidiaries and affiliates, is the largest publicly held personal lines property and casualty insurer in America. Allstate was founded in 1931 and became a publicly traded company in 1993. Allstate provides insurance and retirement products to approximately 16 million households and consists of approximately 70,000 professionals, representing a cross-section of America.

As one of the nation's largest property and casualty insurance carriers, Allstate is frequently the target of class action litigation, and Allstate has a substantial interest in ensuring that class or mass actions affecting interstate commerce are conducted fairly, in forums that are free from local bias.

Allstate was a defendant in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), on which the decision below relies. Because this appeal presents a direct challenge to the ruling in *Caldwell*, Allstate files this *amicus curiae* brief to provide this Court with its perspective on why the

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[1] Pursuant to Rule 37.6, Allstate states that no party, or counsel for a party, authored this brief in whole or in part. No person other than Allstate provided monetary contribution to fund the preparation and submission of this brief. Pursuant to Rule 37.3(a) both parties have consented to the filing of this brief. Allstate is filing copies of the written consent provided by all parties with this brief.

Caldwell decision was correct, and why it should be applied here.

SUMMARY OF ARGUMENT

I. In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), the Fifth Circuit correctly held that federal CAFA jurisdiction exists over attorney general suits that are in reality private "mass" or "class" actions seeking monetary relief in which the true parties in interest are certain individual citizens of the state, while at the same time allowing state courts to adjudicate legitimate *parens patriae* actions through which attorneys general seek to vindicate their state's sovereign interests or the general welfare of its citizens.

Caldwell was an action instituted in Louisiana state court by the Attorney General of Louisiana in the aftermath of Hurricanes Katrina and Rita. Even before *Caldwell* was filed, Allstate and other insurance carriers were defending thousands of individual actions and numerous putative class actions brought on behalf of hurricane victims seeking damages under their property insurance policies. Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Allstate removed to federal court all the class actions originally filed against Allstate in state court. Allstate also removed many of the individual actions based on complete diversity of citizenship.

Nonetheless, the Louisiana Attorney General through *Caldwell* sought a state forum to adjudicate individual damage actions on a mass basis. As in the case at bar, the Louisiana Attorney General cast the *Caldwell* action as a *parens patriae* action; but the Attorney General sought far more than traditional *parens patriae* relief for injury to the State's sovereign interests. *Caldwell*, as here, sought monetary damages on behalf of private individuals, and, also as here, the Attorney General prosecuted *Caldwell* with the assistance of private plaintiffs' lawyers who had filed similar cases on behalf of private plaintiffs seeking essentially the same relief.

The Fifth Circuit held that *Caldwell* fell within CAFA's broad reach, at least insofar as the individual damage claims were concerned. That ruling was eminently correct. By providing class action defendants with a federal forum with minimal diversity of citizenship requirements, CAFA was an important and necessary legislative response to the problem of class action abuse in the state courts. CAFA, Pub. L. No. 109-2, 119 Stat. 4, § 2(a). The Fifth Circuit's ruling in *Caldwell* was a sound judicial determination that CAFA jurisdiction could not be defeated merely by disguising private damage claims as an action by a state attorney general.

Caldwell not only advances CAFA's broad remedial purposes, but it is fully consistent with the plain text of CAFA. The alternative rule urged by Petitioner impermissibly "exalt[s] form over substance," *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345,

1350 (2013), by allowing a mere label to control over the actual substance of the claims alleged. Thus, the *Caldwell* rule is also consistent with this Court's well-settled precedents that reject the use of labels or pleading tactics to control federal jurisdiction.

II. Allstate's experience in *Caldwell* also illustrates that Congress was correct to be concerned that a *parens patriae* loophole would be created if it adopted an amendment carving all such cases out of CAFA's scope. Allowing private plaintiffs to evade CAFA's jurisdictional requirements by enlisting the offices of a state attorney general is not only inconsistent with CAFA's objectives, it is an invitation to federal and state conflict. It serves no useful purpose to require class or mass damages actions meeting CAFA's minimal diversity standards to proceed in federal court, while allowing state attorneys general to seek essentially the same relief in state court. That risks inconsistent adjudications and invariable battles between the jurisdictions as state and federal litigants try to play one forum against another.

This unsettling prospect, however, will undoubtedly follow should this Court reverse the decision below. State attorneys general are increasingly using private class action counsel – often under contingency fee arrangements – to prosecute what are essentially private class actions under the guise of "*parens patriae*" suits. Adding to this problem is that these arrangements often arise in states with a history of the very class action abuses that CAFA was intended to remedy. For example, both Mississippi and

Louisiana (the states at issue here and in *Caldwell*, respectively) were expressly referenced as problematic jurisdictions during the debates leading to the passage of CAFA. The Mississippi Attorney General routinely retains private counsel on a contingency fee basis – his official website currently lists 41 active contingency fee arrangements with private lawyers, a number that very likely will increase if this Court adopts a *parens patriae* loophole.

Accordingly, Allstate respectfully submits that both *Caldwell* and the decision below were correct, and that the Fifth Circuit should be affirmed.

ARGUMENT

I. The Fifth Circuit's Rule In *Caldwell* Is Most Consistent With The Text And Purpose Of CAFA, Particularly Against The Backdrop Of Private Actions Seeking Similar Relief.

The Fifth Circuit's rule in *Caldwell* properly applies federal CAFA jurisdiction over attorney general suits that are truly private "mass" or "class actions" seeking monetary relief for particular individuals, while leaving state courts free to adjudicate legitimate *parens patriae* actions to vindicate a state's sovereign interests or those of the general public. To fully appreciate the Fifth Circuit's ruling in *Caldwell*, and why that case shares many similarities to the case at bar, *Caldwell*'s background is important.

A. Allstate faced thousands of lawsuits, including dozens of overlapping class actions, relating to essentially the same damages sought in *Caldwell*.

The *Caldwell* action sought to recover monetary damages for individual Louisiana policyholders that allegedly were underpaid for their property losses, including losses caused by Hurricanes Katrina and Rita. Compl. ¶ 115, *Caldwell*, No. 07-09409 (E.D. La. Dec. 7, 2007), ECF No. 1-1 (alleging that "Defendants' intentional collusion in suppressing payments to Louisiana insureds for damages caused to their property over many years, including, but not limited to, property damaged from Hurricanes Katrina and Rita" caused damage). The claims were asserted under the Louisiana Monopolies Act, La. Rev. Stat. § 51:121. *Id.* The Attorney General sought treble damages for the policyholders allegedly subject to the underpayment. *Id.* at 27 (prayer for relief); *Caldwell*, 536 F.3d at 429 n.9 (collecting allegations from complaint).

These allegations were not unique. Over a year before *Caldwell* was filed, a series of private actions, including at least two class actions, were filed against various insurance-related defendants asserting similar claims under the Louisiana Monopolies Act. *Caldwell*, 536 F.3d at 423 (citing *Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587 (E.D. La. 2007); *Muzzy v. USAA Cas. Ins. Co.*, No. 06-4773, 2008 WL 4287627 (E.D. La. Feb. 20, 2008); and *Mornay v. Travelers Ins. Co.*, No. 07-5274, 2008 WL

2439941 (E.D. La. June 13, 2008)). As in *Caldwell*, these cases sought treble damages under the Louisiana Monopolies Act for alleged underpayment of insurance claims, including for those arising out of Hurricanes Katrina and Rita.

These private cases had been filed by several of the same plaintiff's counsel retained by the Louisiana Attorney General to file *Caldwell*. *See Caldwell*, 536 F.3d at 421-22 n.2 (noting four firms represented the state, McKernan Law Firm; Herman, Herman, Katz & Cotlar, LLP; Capitelli & Wicker; and Glago Law Firm, LLC). Two of these actions ultimately included class allegations, which would have captured many of the same policyholders at issue in *Caldwell*. *See* Am. Compl., *Schafer*, No. 06-8262, ECF No. 9; Second Am. Compl. & Mot. to Certify Class, *Mornay*, No. 07-5274, ECF Nos. 14, 15.

The *Caldwell* complaint not only copied its theory of liability from private actions, it also sought to recover alleged damages that were the subject of numerous pending class and individual lawsuits. After Hurricanes Katrina and Rita, Allstate and its affiliated companies faced thousands of individual suits alleging underpayment of claims and nearly two dozen putative class actions alleging a variety of contractual, extra-contractual, and statutory theories of liability seeking this same relief on behalf of putative classes of Louisiana policyholders. Some of the class actions were filed directly in federal court, but

most were filed in Louisiana state court and then removed to federal court under CAFA.[2]

B. *Caldwell* was not even the first action filed by the Attorney General to recover for alleged underpayment of Hurricane Katrina and Rita claims.

In addition to *Caldwell* and the various private class actions faced by Allstate and other insurers, an

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[2] *See, e.g.*, *Abadie v. Allstate Ins. Co.*, No. 06-5164 (E.D. La. Aug. 28, 2006); *Aguilar v. Allstate Fire & Cas. Ins. Co.*, No. 06-4660 (E.D. La. Aug. 24, 2006); *Arieux v. The Allstate Cos.*, Nos. 06-5144 & 06-5146 (E.D. La. Aug. 28, 2006); *Austin v. Allstate Fire & Cas. Inc.*, No. 06-5383 (E.D. La. Aug. 29, 2006); *Banks v. United States*, No. 05-6853 (E.D. La. Jan. 6, 2006); *Berryman v. Encompass Prop. & Cas. Co.*, No. 05-6457 (E.D. La. Dec. 12, 2005); *Borne v. Allstate Indem. Co.*, No. 06-1271 (E.D. La. Mar. 10, 2006); *Caruso v. Allstate Ins. Co.*, No. 06-2613 (E.D. La. May 19, 2006); *Chehardy v. Louisiana Ins.*, No. 06-1672 (E.D. La. Mar. 28, 2006); *Garnett v. Allstate Ins. Co.*, No. 05-6455 (E.D. La. Dec. 12, 2005); *Gauntt v. Louisiana Citizens Prop. Ins. Corp.*, No. 06-7817 (E.D. La. Oct. 11, 2006); *Gillard v. Allstate Ins. Co.*, No. 06-7375 (E.D. La. Oct. 5, 2006); *Huntley v. Allstate Indem. Co.*, No. 05-6887 (E.D. La. Oct. 5, 2006); *Keifer v. Allstate Ins. Co.*, No. 06-5370 (E.D. La. Aug. 29, 2006); *Randall v. Allstate Ins. Co.*, No. 06-1053 (E.D. La. Feb. 27, 2006); *Sinclair v. Allstate Indem. Co.*, No. 06-1095 (W.D. La. June 28, 2006); *Terrebonne v. Allstate Ins. Co.*, No. 06-4697 (E.D. La. Aug. 25, 2006); *Williams v. State Farm Fire & Cas. Co.*, No. 06-2919 (E.D. La. June 2, 2006). Ultimately, these cases were consolidated into an insurance master class action complaint. Compl., *In re Katrina Canal Breaches Consol. Litig.*, 05-4182 (E.D. La. Mar. 15, 2007), ECF No. 3415. As to the individual cases, the docket of the Eastern District of Louisiana contains records of these removals – too voluminous to list here – which continued to occur for several years after Hurricanes Katrina and Rita as new suits were filed.

earlier class action had been filed by the State of Louisiana itself. *See* Compl., *Louisiana v. AAA Ins. Co.*, No. 07-5528 (E.D. La. Sept. 11, 2007), ECF No. 1-1. In that case too, the State was represented by private class counsel who were retained through the Attorney General's office, including at least one of the same firms that ultimately filed *Caldwell*.[3] In that lawsuit – commonly known as the "*Road Home Action*" – the State sought to recoup additional insurance proceeds to offset public grants provided to Louisiana residents under the Road Home program. *See In re Katrina Canal Breaches Litig.*, 524 F.3d 700, 703-04 (5th Cir. 2008) (addressing CAFA removal issue in *Road Home Action*). The complaint also included class action allegations to cover any additional sums beyond the Road Home grant amounts that might be owed to individual policyholders. *Id.*

Importantly, when the *Road Home Action* was filed, the Louisiana Attorney General at the time, Charles Foti, specifically acknowledged that some of the legal theories in the complaint had been rejected by the federal courts and that this suit was an attempt to retry those issues in "more favorable" state courts. David Hammer, *Foti sues insurers over*

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[3] The McKernan Law Firm represented the Attorney General and State in both *Caldwell* and the *Road Home Action*, along with a different grouping of private class attorneys in each case. *Compare Caldwell*, 536 F.3d 422 n.2 (listing the McKernan Law Firm and three other firms as counsel for the Attorney General) *with Louisiana v. AAA Ins. Co.*, No. 07-5528 (E.D. La. Sept. 11, 2007) at ECF No. 1-1 at 37 (*Road Home* petition's list of counsel).

Katrina flood exemptions; He says Road Home took on their burden, The Times-Picayune, Sept. 7, 2007, at 1. The *Road Home Action* class allegations also were intended to toll the statute of limitations for individual litigants. *See* Rebecca Mowbray, *Insurance deadline in question; Class actions play a role, court rules*, The Times-Picayune, Jan. 17, 2009, at 9 (reporting that the plaintiff's counsel, who was one of the attorneys representing the State in *Road Home Action*, was arguing that *Road Home* and other class actions should provide additional tolling of any statutory or contractual limitations periods).

Allstate removed the *Road Home Action* to federal court. Removal Notice, *Road Home*, No. 07-5528 (E.D. La. Sept. 18, 2007), ECF No. 1. The State, through the Attorney General and his retained private attorneys, quickly moved to remand arguing that – notwithstanding the express class allegations – the suit was really a *parens patriae* action that should remain in state court. *See* Mot. to Remand at 16-17, *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. Oct. 9, 2007), ECF No. 8282-1 ("In this matter, the State, through the attorney general, has filed a lawsuit in its capacity as *parens patriae* . . . CAFA does not apply to such a lawsuit.").[4] Ultimately,

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[4] The *Road Home Action* was consolidated into *In re Katrina Canal Breaches Consolidated Litigation*, case number 05-4182, along with most of the Hurricane Katrina-related actions pending in the Eastern District of Louisiana. Order, *Road Home*, No. 07-5528, (E.D. La. Sept. 18, 2007), ECF No. 6.

(Continued on following page)

the State's *parens patriae* argument was rejected in the *Road Home Action* largely because of the State's inclusion of express class allegations in its complaint. *In re Katrina Canal Breaches Consol. Litig.*, 524 F.3d at 712.[5]

C. The Attorney General attempts to avoid the jurisdictional traps from prior cases by labeling the *Caldwell* action a "*parens patriae*" suit.

Caldwell was filed approximately two months after *Road Home* was removed under CAFA based on the class action allegations in the *Road Home* complaint. Accordingly, and in an effort to thwart removal, the *Caldwell* complaint avoided any express class action or mass action allegations even though the substance of the complaint, as in *Road Home*, sought mass private damage recoveries on behalf of

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The case was deconsolidated in April 2009. Order, *Road Home*, No. 07-5528 (E.D. La. Apr. 17, 2009), ECF No. 22.

[5] The state's unsuccessful attempts to return to the "more favorable" state court continued even after the Fifth Circuit's ruling. The additional motion to remand practice was driven by the State and its private class counsel's decision to abandon the class claims entirely in order to try to save their preferred state court venue. Order, *Road Home*, No. 07-5528 (E.D. La. Sept. 30, 2009), ECF No. 106 (refusing to consider the Attorney General's motion to remand because the case was pending on appeal to the United States Circuit Court of Appeals for the Fifth Circuit on a second appeal relating to the defendants' motions to dismiss); Order, *Road Home*, No. 07-5528, (E.D. La. Oct. 19, 2011), ECF No. 169 (denying renewed motion to remand).

thousands of individual citizens based on their individual insurance contracts.

Moreover, the claims asserted in *Caldwell* were nearly identical to those in the private cases under the Louisiana Monopolies Act that were pending in the federal courts. *Supra* 6-7. The compensatory damages sought in *Caldwell* also covered the same damages at issue in all the above cases, namely underpayment of insured losses related to Hurricanes Katrina and Rita. Compl. ¶ 115, *Caldwell*, No. 07-9409 (E.D. La. Dec. 7, 2007), ECF No. 1-1. As the Fifth Circuit recognized, the Attorney General's own complaint alleged that he was "seeking to recover damages suffered by *individual policyholders*," not the State itself. *Caldwell*, 536 F.3d at 429 & n.9 (emphasis added by court, collecting quotes from Complaint).

D. The *Caldwell* Court correctly determined that the claims alleged fell within CAFA's plain text.

Based on those allegations, the *Caldwell* Court correctly concluded the case before it satisfied the definitional criteria of CAFA even if the complaint were labeled a "*parens patriae*" action. Regardless how the action was captioned, the "real parties in interest" were the thousands of individual damage claimants whose interests the Attorney General purported to represent. The plain language of CAFA's mass action provision – "a civil action . . . involving the monetary

claims of 100 or more persons that is proposed to be tried jointly. . . . ," 28 U.S.C. § 1332(d)(11)(B)(i) – therefore squarely applied to the Attorney General's complaint. *Caldwell*, 536 F.3d at 430. The claims and damages sought were (1) monetary claims; (2) that belonged to more than 100 policyholders; and (3) the attorney general sought to have those claims tried jointly. *Id.*

This same result could have been reached under the "class action" provisions of CAFA, because a "class action" is "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). A "*parens patriae*" action as used by the Louisiana Attorney General in *Caldwell* satisfies this definition because the Attorney General sought to represent a class of specific Louisiana policyholders in asserting their purported right to monetary damages, and claimed that he had statutory authority to do so. *Cf. Caldwell*, 536 F.3d at 429-30 (court observes that the Attorney General claimed standing to "sue for treble damages in a representative capacity under state law," but not reaching that issue). Indeed, the district court had denied the motion to remand based upon its

conclusion that the *Caldwell* complaint met CAFA's definition of a "class action."[6]

The Senate Report confirms that CAFA was intended to extend to such cases:

> [T]he definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.

S. Rep. No. 109-14 at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3; *see also Caldwell*, 536 F.3d at 424 (quoting this language). Thus, under the plain text of both the CAFA "mass action" and "class action" provisions, actions like the one in *Caldwell* – and the action at issue here – are covered by CAFA regardless whether they are labeled "*parens patriae*."

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[6] The district court's reasoning was contained in a hearing transcript, which was made part of the record in the Fifth Circuit appeal. *See* Mot. to Supp. Rec., *Caldwell*, No. 08-30465 (5th Cir. May 27, 2008), Doc No. 0051412904 at 50 ("I find that CAFA requirements with respect to Section 137 are met, and I feel that the case is really an artfully pled class action."); Order, *Caldwell*, No. 08-30465 (5th Cir. May 28, 2008) (granting motion for leave to supplement record).

E. The *Caldwell* rule is also consistent with this Court's jurisdictional precedents that require courts to look to the substance of the claims pled rather than mere labels.

The *Caldwell* court's conclusion is not only consistent with the statutory text of CAFA, it is also consistent with this Court's jurisdictional precedents rejecting the use of labels or artifices to avoid federal jurisdiction. Most recently, this Court unanimously held in *Standard Fire Insurance Co. v. Knowles* that pre-certification stipulations as to the amount in controversy could not be used to defeat CAFA jurisdiction. 133 S. Ct. 1345, 1350 (2013). This Court observed that another possible tactic (artificially dividing up a class into numerous separate class lawsuits) should suffer the same fate because to hold otherwise would "exalt form over substance, and run directly counter to CAFA's primary objective" by allowing a pleading tactic to circumvent federal jurisdiction that would otherwise exist over the claims alleged. *Id.*

The rule rejecting the use of formalisms or contrivances to defeat federal jurisdiction is well-established in this Court's precedents. *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) ("Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right. . . ."); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (district court properly found that respondents "had attempted to avoid removal jurisdiction by 'artful[ly]'

casting their 'essentially federal law claims' as state-law claims"); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) ("A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case").

The same reasoning embraced by these precedents, including *Knowles*, was used by the Fifth Circuit in *Caldwell*. 536 F.3d at 424 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach") (citations omitted). That approach, as well as the result, was fully consistent with this Court's repeated refusals to allow form to prevail over substance in matters of federal jurisdiction. *Knowles*, *supra*.

F. *Caldwell*'s assertion of federal CAFA jurisdiction over mass or class damages actions on behalf of private individuals does not prevent state attorneys general from pursuing enforcement actions in state court, nor does it prevent true *parens patriae* actions from being adjudicated in state court.

Nothing in *Caldwell* would cause true *parens patriae* actions – ones in which a state seeks to protect solely a sovereign or quasi-sovereign interest rather than pursuing an aggregation of private damage claims – to be subject to federal CAFA jurisdiction.

The Fifth Circuit's opinion in *Caldwell* traced the history of *parens patriae* jurisprudence in reaching its determination that the complaint and claims in *Caldwell* fell outside the historic scope of *parens patriae* actions. *Caldwell*, 536 F.3d at 425-30. Implicit in this discussion was the determination that a true *parens patriae* action – *i.e.*, one in which the state was the only real party in interest – would not fall within CAFA's reach. *Id.* at 430.

That conclusion flows directly from this Court's own *parens patriae* precedents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) (recognizing improper *parens patriae* suit includes those in which state "attempt[s] to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. *In such situations, the State is no more than a nominal party.*") (emphasis added); *see also Caldwell*, 536 F.3d at 426 (quoting this language). The action in *Caldwell* was a quintessential example of such an improper *parens patraie* suit in which the State primarily pursued private monetary claims as a nominal party.

In contrast, cases in which a state pursues a sovereign or quasi-sovereign interest would fall outside the scope of CAFA. Such actions could include suits to abate a public nuisance that is generally impacting on the state and its citizens, *Alfred L. Snapp & Son*,

458 U.S. at 603-04 (collecting examples of such cases), or suits in which a state seeks to protect all its citizens from discriminatory conduct occurring in another state that disadvantages both the state and its citizens generally from fully benefiting from the federal system, *id.* at 609-10. The cases in which this Court has determined that a state appropriately sued as *parens patriae* are typically cases where the relief sought is limited to injunctive and non-monetary relief. *Compare id.* at 598 (noting Puerto Rico sought declaratory relief as to past conduct and injunctive relief to prevent similar conduct in the future) *with Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) (rejecting Hawaii's attempt to sue in its *parens patriae* capacity for damages to its "general economy," because such "damages" would be "no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves . . . [and even] the most lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages" to the state in a *parens patriae* capacity).

This conclusion that the *Caldwell* rule would not extend to true *parens patriae* suits also finds support in the text of CAFA itself. A true *parens patriae* action – like the one at issue in *Alfred L. Snapp & Son*, 458 U.S. at 603 – would not satisfy CAFA's definition of either a "mass action" or "class action" because there would be no aggregation of privately held monetary claims. Thus, the *Caldwell* rule properly exercises CAFA jurisdiction over cases that are truly private in

nature, because the state is merely seeking to aggregate privately held damages claims, while leaving to state courts those cases in which the state is seeking to vindicate its sovereign or quasi-sovereign interests.

II. The *Caldwell* Case Represented A Form Of Class Action Abuse That Congress Sought To Prohibit Through CAFA.

There is no doubt that – in an appropriate case – the class action mechanism can provide a valuable tool serving both the interests of judicial economy and those of absent class members by allowing aggregation of low-value private claims that might otherwise not be remedied. *See generally* CAFA, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(1). However, the class action mechanism is also fraught with the potential for significant abuses, some of which Congress sought to prevent by enacting CAFA. *Id.* § 2(a)(2)-(4).

The abuses Congress identified included potential state court bias against out-of-state defendants, *id.* § 2(a)(4), as well as duplicative and overlapping class actions, S. Rep. No. 109-14 at 23 (noting these "copy cat" actions sometimes involve "blatant forum shopping" that undermines the judicial economy intended by class actions because "[t]he 'competing' class actions must be litigated separately in an uncoordinated, redundant fashion"). Congress also recognized class settlements in certain state courts were subject to less judicial scrutiny leading to settlements in which class counsel were paid exorbitant fees

with little or no benefit flowing to the class members themselves. CAFA, Pub. L. No 109-2, 119 Stat. 4 § 2(a)(3).

Congress sought to stop these and other abuses by enacting CAFA. *Id.* § 2(b). Significantly, Congress rejected a proposed amendment that would have expressly excluded suits brought by state attorneys general from CAFA's jurisdictional reach, precisely because state attorneys general could be co-opted into lending their name to what in essence is a private damage action. *See* 151 Cong. Rec. 1163-64 (statement of Sen. Hatch concluding that such an exception would "create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court . . . [by] persuad[ing] a State attorney general to simply lend the name of his or her office to a private class action.") (statement of Sen. Hatch); *Caldwell*, 536 F.3d at 424 (quoting this language).

As demonstrated above, *Caldwell* represented just such an attempt to use the offices of a state attorney general to pursue mass litigation of private claims while evading CAFA jurisdiction. *See*, *supra*, Part I.A-I.C. The private attorneys representing the State filed *Caldwell* duplicating the same claims and relief sought in other federal class actions that had been removed to federal court under CAFA. *Id.* The intent was apparent; to try to keep those same claims in state court, which these attorneys and the Louisiana Attorney General viewed as a more favorable

forum. *See supra* at notes 4 & 5 and accompanying text.

Nothing could be more inimical to federal CAFA jurisdiction. Had the Fifth Circuit determined that CAFA did not apply to the *Caldwell* action, it would have meant that the same claims and issues – asserted against out-of-state defendants and affecting interstate commerce – would have been litigated in both federal and state court, with potentially duplicative proceedings and a significant risk of inconsistent adjudications. That result would clearly undermine CAFA's broad remedial purposes, including its express purpose of providing a federal forum for out-of-state class action defendants, free from the biases of the local state courts.

That kind of result is particularly troubling given the increasing use of private attorneys to litigate attorney general actions – often under contingent fee arrangements. *See generally* John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs*, 57 Stan. L. Rev. 1441, 1461-68 (2005) (discussing attorneys general's increasing use of private class counsel to prosecute lawsuits, including through contingency fee arrangements); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 668-75 (2012) (recognizing that these "*parens patriae*" suits are essentially the same as "cases that would otherwise be the subject [of private] class actions," but arguing in favor of expanded use of this practice

in order to avoid "class action waivers and, at least for now, the other, lesser challenges that afflict class actions").

In fact, some of the same states where private counsel are increasingly being retained by the attorney general through contingency fee agreements are those states with judicial systems labeled as problematic by Congress when it passed CAFA.[7] While one

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[7] For example, both Mississippi and Louisiana (the states at issue here and in *Caldwell*, respectively) were referenced as problematic jurisdictions during the debates leading to the passage of CAFA. *See, e.g.*, 150 Cong. Rec. 7725 (statement of Senator Kohl "[C]ertain State and county courts welcome the sort of unfair class action suits that lead to the embarrassing settlements that we are trying to end. Anyone who follows this problem can say that class action cases brought in Madison County, IL or certain counties in Florida or *throughout most of Mississippi* will succeed regardless of the merits of the case and regardless of how poorly any truly injured consumers make out in the settlement") (emphasis added); 151 Cong. Rec. 1226 (statement of Senator Vitter of Louisiana noting a recent study of general counsel ranked Louisiana as one of the worst states for treatment of class actions).

The Mississippi Attorney General routinely retains private counsel on a contingency fee basis. *See* Miss. Office of the Attorney General (Sept. 5, 2013), http://www.agjimhood.com/index.php/sections/divisions/outside_counsel (listing active contingency fee contracts in 41 cases, including this case under heading "LCD Agreement"). As the Caldwell and Road Home actions demonstrate, Louisiana's Attorney General has attempted to engage in a similar practice. *See* Order at 14-16, *Road Home*, No. 07-5528 (Aug. 13, 2008 E.D. La.) ECF No. 14 (denying in part defendants' motion to disqualify the private counsel, but deferring ruling on issue of whether the retention agreement, in

(Continued on following page)

might hope that the state attorney general would be vigilant to avoid such abuses, history demonstrates this is not always the case.

If this Court were to reverse the decision below, this *parens patriae* loophole will continue to grow in scope, with state attorneys general being wittingly or unwittingly co-opted into bringing so-called "*parens patriae*" actions solely to vindicate private interests while at the same time evading federal jurisdiction. That is not the traditional province of proper *parens patriae* actions, and that is certainly not what Congress intended in enacting CAFA.

CONCLUSION

Amicus curiae Allstate Insurance Company respectfully submits that this Court should affirm the Fifth Circuit's decision below. As demonstrated by Allstate's experience in the *Caldwell* case, the rule adopted by the Fifth Circuit is not only consistent with the plain text of CAFA, it will best achieve Congress's objectives by allowing federal jurisdiction over truly private actions even when brought by a state attorney general, while leaving to state courts true *parens patriae* suits that seek to vindicate the

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which the private attorneys were to be paid "as provided by State or Federal law," violated Louisiana statutes).

interests of the state itself, or the shared and general interests of the citizens of that state.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

STATE OF MISSISSIPPI,
Petitioner,

v.

AU OPTRONICS CORP., ET. AL,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CENTER FOR STATE ENFORCEMENT OF ANTITRUST AND CONSUMER PROTECTION LAWS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. ("State Center") is a nonprofit public interest organization. Its mission is to enhance consumer welfare by supporting the fair and effective enforcement of antitrust and consumer protection laws at the state level. Among other things, it provides grants for experts, document management software and other resources for use by state law enforcement officers in investigations relating to potential violations of the antitrust and consumer protection laws; offers educational assistance grants for law enforcement officials in state attorney general offices; and facilitates access for state attor-

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the brief's preparation or submission.

neys general to economists with expertise in industrial organization and consumer protection issues.

The State Center is concerned that the decision below, if upheld, will significantly impair the ability of state attorneys general to prosecute actions in state court to restrain and redress violations of state antitrust and consumer protection laws. Vigorous enforcement of those laws is essential to secure the benefits of a fair and honest marketplace for the citizens of each state.

SUMMARY OF ARGUMENT

The Fifth Circuit's "claim-by-claim" approach to removal pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat.4, erroneously construes the pleading of a claim for monetary relief — even though authorized by state law — as transforming a *parens patriae* lawsuit from a routine law enforcement action into one fraudulently pleaded to avoid federal jurisdiction. The Fifth Circuit's approach lacks any factual foundation, is inconsistent with CAFA's statutory framework, and diminishes the ability of state attorneys general to enforce fundamental state laws intended to secure the economic well-being of their citizens. Moreover, it puts undue weight on the attorney general's choice of counsel and unnecessarily enmeshes federal courts in difficult questions of state law best resolved by state courts.

ARGUMENT

I. *Parens Patriae* Lawsuits Are Actions to Enforce State Laws, Not Fraudulent Or Deceptive Pleadings Intended To Evade Federal Jurisdiction

A. The Fifth Circuit's "claim-by-claim" approach misconstrues the purpose of *parens patriae* actions

The "claim-by-claim" test used by the Fifth Circuit in CAFA removal cases requires a federal judge to determine whether a *parens patriae* pleading contains a claim that has been "fraudulently pleaded to prevent removal." Pet. App. 4a (citing *Louisiana ex rel. Caldwell v. Allstate Insurance Company*, 536 F.3d 418, 424-25 (5th Cir. 2008)). The claim found to have justified removal, in both *Caldwell* and the case below, was the attorney general's prayer for monetary relief in an action to enforce state antitrust and/or consumer protection laws. The *Caldwell* majority opinion, the genesis of the Fifth Circuit's "claim-by-claim" test, upheld removal of the

Louisiana attorney general's *parens patriae* action even though it assumed he had authority "extensive enough to allow the State to sue for treble damages . . . under state law." *Caldwell*, 536 F.3d at 429.

The Fifth Circuit's approach is based upon a fundamental misunderstanding regarding the purpose of *parens patriae* actions. Protecting their citizens from harm caused by anticompetitive schemes and other unfair or deceptive acts and practices is a core state interest of long-standing. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 ("a State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general"). A lawsuit to vindicate that interest is a law enforcement action even though some state citizens may benefit more than others from a successful prosecution, whether the relief

obtained is restitution, damages, fines, penalties or an injunction.[2]

State laws to protect the economic well-being of businesses and consumers who participate in state and local markets are venerable and ubiquitous. They have not been recently enacted to abet efforts by state attorneys general to avoid federal jurisdiction. On the contrary, they reflect the states' legitimate historical efforts to prevent economic wrongdoing within their borders

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[2] Indeed, many state law enforcement actions other than *parens patriae* actions confer disparate benefits on a state's citizens and would therefore be subject to removal under CAFA under the Fifth Circuit's approach. For example, a variety of state statutes authorize state administrative and law enforcement agencies to seek restitution. *See, e.g.*, CONN. GEN. STAT. § 36b-27(b)(1) (authorizing restitution in cases of securities fraud); GA. CODE. ANN. § 43-17-13(a)(2)(A)(iv) (same for unauthorized or dishonest solicitation for charities); IDAHO CODE ANN. § 26-1117(1)(b)(iv) (same for unauthorized banking and breach of state banking regulations); 820 ILL. COMP. STAT. § 60/20(a) (same for failure to fund employee trust fund); S.C. CODE ANN. § 39-73-320(d) (same for commodities fraud).

State antitrust laws predate the Sherman Act and have been widely adopted.[3] State consumer protection laws are also long-standing and virtually universal.[4] Moreover, many states provide specific statutory authorization to their attorneys general to seek damages or restitution for violations of state antitrust and consumer protection laws.[5] Indeed, recovery of monetary relief, especially treble damag-

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[3] A purpose of the Sherman Act, according to Senator Sherman himself, was to "supplement the enforcement" of state laws. 21 CONG. REC. 2457 (1890). At least thirteen states had enacted antitrust legislation prior to the passage of the Sherman Act in 1890. *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,* 135 U. PA. L. REV. 495, 499. Most states now have their own antitrust laws. *See* http://antitrustinstitute.org/~antitrust/content/statutes.

[4] The Mississippi Consumer Protection Act (MISS. CODE ANN. § 75-24-1, et seq.), which is the basis of Count I of the complaint herein, was enacted in 1974. Most states now have their own consumer protection laws. *See* http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

[5] *See, e.g.*, ALASKA STAT. § 45.50.577; COLO.REV.STAT. § 6-4-111; FLA.STAT.ANN. § 542.22; IDAHO CODE § 48-108; 740 ILL. COMP. STAT. ANN. 107.2; NEB. REV. STAT. § 84-212; OHIO REV. CODE ANN. § 109.81; OKLA.STAT.ANN. TIT. 79, § 205; and R.I GEN. LAWS § 6-36-12.

es, can be an important deterrent to further violations of those laws and, thus, serves an important law enforcement purpose. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision . . . is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.").

When the states' chief law enforcement officers seek relief authorized by state laws to secure the benefits of a fair and honest marketplace, they are simply doing their jobs. *See, e.g., Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594 (Mo. 1982) ("By instituting the *parens patriae* damage actions, the attorney general has carried out his statutory and common law duty to enforce public rights and protect citizen consumers against violation of the antitrust laws."). A decision about what relief to seek — in this case to redress alleged violations of Mississippi's

antitrust and consumer protection laws — is no different in kind from that made by any prosecutor when filing a complaint. A claim for monetary relief in a *parens patriae* action provides no more justification for an inference of fraudulent or deceptive pleading than would a claim for restitution in a criminal proceeding. *Cf.* 18 U.S.C. § 2259 (authorizing restitution in criminal cases).

The Fifth Circuit's deprecation of state attorneys general is also inconsistent with the confidence reposed in them by CAFA itself. CAFA requires that notification of proposed class action settlements be provided to appropriate federal and state officials. 28 U.S.C.A. §1715. Absent a primary regulator, supervisor or licensing authority, that state official is the attorney general. *Id.* State attorneys general have vindicated Congress's confidence in them by object-

ing to class action settlements which they believe are unfair or inadequate.[6]

The "whole complaint" test used by the Fourth, Seventh and Ninth Circuits, in contrast to the Fifth Circuit's "claim-by-claim" test, correctly recognizes that *parens patriae* proceedings are law enforcement actions and that their essential nature is not transformed by the inclusion of a claim for monetary relief. Moreover, the "whole complaint" approach — in contrast to the Fifth Circuit's "claim-by-claim" approach — does not require an inference that a complaint has been pled fraudulently or de-

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[6] *See, e.g., Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292 (S.D.Fl. 2007) (proposed class action settlement rejected based in part on objections by attorneys general of 35 states and the District of Columbia); *In re American Investors Life Insurance Co. Annuity Marketing And Sales Practice Litigation*, 263 F.R.D. 226 (E.D. Pa. 2009)(release in proposed class action settlement amended in response to objections made by two state attorneys general); and *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052 (C.D. Ca. 2010) (proposed class action settlement rejected based in part on objections by attorneys general of 26 states).

ceptively simply because it contains a claim for monetary relief. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 393-4 (4th Cir. 2012) (claim for restitution "alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings ... in seeking to protect its citizens against price-fixing conspiracies"); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011)(a *parens patriae* action to enforce the Illinois Antitrust Act is not a "disguised class action or mass action" because it sought treble statutory damages in addition to civil penalties and injunctive relief); and *Nevada v. Bank of America Corp.*, 672 F.3d 661, 671-72 (9th Cir. 2012) (Nevada's "sovereign interest in protecting its citizens . . . from deceptive mortgage practices" made it the real party in interest although restitution was sought in addition to civil penalties and injunctive relief).

The decision below, based on the Fifth Circuit's flawed "claim-by-claim" test, will seriously impede enforcement of state antitrust and consumer protection laws if allowed to stand. State attorneys general have limited resources to enforce these laws, which are critical to the proper functioning of state and local markets. Antitrust cases, in particular, are resource intensive.

The cost of litigating a case in federal court may increase substantially if it is transferred after removal to a distant forum. For example, in the case at bar, respondents sought after removal to have the case transferred to the United States District Court for the Northern District of California, over two thousand miles from the court where it was originally filed. Pet. App. 26a. Litigating cases across such enormous distances could be prohibitively expensive for many states. Such "jurisdictional gamesman-

ship," as practiced by defendants, could well deter the vigorous enforcement of state antitrust and consumer protection laws. Pet. App. at 4a.

B. Use of outside counsel by state attorneys general does not transform a law enforcement action into a class action or a mass action

A factor that influenced the *Caldwell* majority's decision to pierce the pleadings and subject them to a "claim-by-claim" analysis was the Louisiana Attorney General's use of private counsel.[7] The use of private counsel (especially those with special skills or expertise in a complex subject matter like antitrust), however, does not transform a law enforcement action into a class action or mass action. Nothing in the language or legislative history of CAFA suggests that a state attorney general should

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[7] The majority opinion repeatedly adverts to use of private counsel (including in its very first paragraph) and even characterizes the Louisiana Attorney General and private counsel as "collectively Louisiana." *Id.*, at 421 and 423.

be barred from prosecuting a *parens patriae* action brought in state court for violation of state law based on his or her choice of counsel.

On the contrary, as the LCD antitrust litigation itself demonstrates, an attorney general's choice of counsel is irrelevant. Both the Mississippi and South Carolina attorneys general have relied on private counsel to assist in prosecuting their respective LCD *parens patriae* antitrust actions, while the Illinois, Washington and California attorneys general have not.[8] There is no basis to conclude, as a result, that one group of attorneys general has engaged in conduct that justifies removal, while the other has not. If anything, their different choices almost certainly reflect the disparate enforcement

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[8] *Compare* the case at bar and *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) with *LG Display Co., Ltd. V. Madigan*, 665 F.3d 768 (7th Cir. 2011) and *Washington v. Chimei*, 659 F.3d 842 (9th Cir. 2011).

resources available to the attorneys general in each state. [9]

Indeed, government antitrust enforcement agencies with far greater resources than Mississippi or South Carolina — or that of any individual state — have sometimes employed private counsel to assist in prosecuting complex antitrust cases. For example, the government enforcement action against Microsoft was the product of separate complaints filed by the United States and by New York on behalf of a group of states and the District of Columbia. *See New York v. Microsoft Corp.*, 209 F.Supp.2d 132 (D.D.C. 2002). Lead trial counsel for the United States was a prominent private trial attorney while

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[9] Small states may have just one assistant attorney general with some antitrust responsibilities, while larger states may have full-time staffs dedicated to enforcing the antitrust laws. *See* "Offices of the Attorneys General Antitrust Contacts" *available at* http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/antitrust_chiefs.authcheckdam.pdf.

his state counterpart was a New York assistant attorney general; on appeal, the case was argued for the United States by a member of the Solicitor General's Office while the states were represented by a prominent appellate advocate from the private bar.[10]

The participation at trial by David Boies for the United States and on appeal by John G. Roberts, Jr. for the plaintiff states did not alter the fundamental character of the Microsoft litigation as a government law enforcement action. Indeed, there is a long tradition of reliance on private attorneys by

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[10] See "U.S. v. Microsoft, Key Players" *available* at http://www.washingtonpost.com/wp-srv/business/longterm/microsoft/keyplayers.htm; and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Similarly, the Federal Trade Commission has also retained private counsel to assist in certain matters. See "FTC Hires Beth Wilkinson To Lead Google Antitrust Investigation" *available at* http://www.paulweiss.com/practices/litigation/antitrust/news/ftc-hires-beth-wilkinson-to-lead-google-antitrust-investigation.aspx?id=9991.

government at all levels in a variety of matters.[11] In short, there is no basis to draw an adverse inference from the government's use of private counsel in a law enforcement action absent evidence that the responsible government officials improperly have ceded their authority to prosecute the action in the public interest.

II. Removal Of *Parens Patriae* Actions Inevitably Will Require Federal Courts To Resolve Significant Issues Of State Law Best Resolved By State Courts

In our federalist system, the states "are not relegated to the role of mere provinces or political corporations." *Alden v. Maine*, 527 U.S. 706, 715

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[11] See, *e.g.*, *Filarsky v. Delia*, *132 S.Ct. 1657, 1663* (2012) ("Even such a core government activity as criminal prosecution was often carried out by a mixture of public employees and private individuals temporarily serving the public. At the time § 1983 was enacted, private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State. Abraham Lincoln himself accepted several such appointments. In addition, private lawyers often assisted public prosecutors in significant cases.").

(1999). Each state is "endowed with all the functions essential to separate and independent existence." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (*quoting Texas v. White*, 7 Wall. 700, 725 (1869). It follows, accordingly, that "only state courts may authoritatively construe state statutes." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996).[12]

State *parens patriae* statutes have one thing in common: they authorize law enforcement actions in the public interest. Otherwise, they are incredibly diverse. Thus, they police violations of a wide range of state laws, from antitrust (*e.g.*, COLO. REV. STAT. § 6-4-111; DEL. CODE ANN. TIT. 6, § 2108) to real es-

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[12] *See also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (Stewart, J., concurring) ("federal courts have the power to refrain from hearing . . . cases raising issues intimately involved with the States' sovereign prerogative, the proper adjudication of which might be impaired by unsettled questions of state law")) (quotation marks and brackets omitted).

tate fraud (*e.g.*, IND. CODE ANN. § 24-5-0.5-4(c)) to unfair or deceptive trade practices (*e.g.*, WASH. REV. CODE. § 19.86.080). They also authorize a variety of penalties and remedies, ranging from injunctive relief (*e.g.*, OKLA. STAT. ANN. TIT. 79, § 205) to disgorgement and restitution (*e.g.*, ARK. CODE § 4-75-212; IOWA CODE § 714.16) to treble damages (*e.g.*, CAL. BUS. & PROF. CODE § 16760; IND. CODE ANN. § 24-5-0.5-4(c)(3)). Moreover, some authorize the state attorney general to sue where no other party is allowed to sue (*e.g.*, ALASKA STAT. § 45.50.577(i)) or express a clear preference for actions brought by the attorney general over private actions (*e.g.* MD. CODE ANN., COM. LAW §11-209(c)).

The disparate language of these statutes and their unique nature as law enforcement actions virtually guarantee that they will raise significant, novel issues of state law. The Fifth Circuit's cookie-

cutter "claim-by-claim" approach to removal is, thus, not only inappropriate, but inevitably will enmesh the federal courts in exactly the types of issues that this Court has said are best resolved by state courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* DRI[1]

DRI is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI's members routinely defend clients in class action litigation across the nation. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, more efficient, and – especially on national issues – consistent.

To promote its objectives, DRI participates as amicus curiae in cases that raise issues of vital concern to its membership, their clients, and the judicial system. This is such a case. DRI believes that resolution of the important jurisdictional issues raised by this case is critical because the approach advanced by Petitioner will eviscerate the protections that the Class Action Fairness Act of 2005 ("CAFA") affords. The issue presented affects a substantial number of cases of nationwide importance that are potentially removable under CAFA.

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from DRI, its members, and its counsel, made a monetary contribution to the brief's preparation or submission. DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. Counsel consented to the briefs' filing in letters that are on file with the Clerk's office.

The decision below, if reversed by this Court, would allow plaintiffs' lawyers to avoid federal review of cases with national implications by teaming up with state attorneys general to bring class or mass actions seeking to recover huge awards under the guise of a parens patriae action and thus avoid the removal provisions that Congress enacted for class and mass actions.

Because the right of removal is an issue of particular significance to defendants, DRI's members and their clients are frequently confronted with the issues raised by this case. Collaboration between some state attorneys general and plaintiffs' class action lawyers has resulted in a number of serious problems for the civil justice system. Indeed, DRI, alone and also in conjunction with other legal organizations, has conducted seminars studying these lawsuits and the problems they create long before this case. In July 2010, DRI, through the National Foundation for Judicial Excellence (NFJE), held its Sixth Annual Judicial Symposium. The Symposium included, among other related topics, a discussion lead by Professor Donald G. Gifford of the University of Maryland School of Law on "*Public Nuisance: An Overview of the Use of an 800-Year-Old Doctrine to Support Mass Liability and Parens Patriae.*" See http://nfje.net/Resources/aspx. Professor Gifford highlighted concerns about the stretching of common law doctrines in ways that can harm the civil justice system. Similarly, Lawyers for Civil Justice, a national organization of corporate counsel and defense lawyers supporting civil justice reform (LCJ), featured a panel with attorneys general from Alabama and South Carolina at its most recent meeting to discuss these issues. Among the materials included as a part of this panel was testimony on the

topic of contingent fees and conflicts of interest created when state attorneys general team up with plaintiffs' class action lawyers.

In sum, the issue is critically important to DRI's members and their clients, as well as the defense bar at large. This Court's review and affirmance of the decision below will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

SUMMARY OF ARGUMENT

The enactment of the Class Action Fairness Act of 2005 ("CAFA") brought amount a major change in diversity jurisdiction. Congress saw abuses in the current class action scheme, particularly by lawyers "gam[ing] the procedural rules [to] keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes..." S. Rep. No. 109-14, p. 5 (2005). This gamesmanship was facilitated by jurisdictional requirements mandating complete diversity for federal court removal. 28 U.S.C. § 1332(a). Congress therefore enacted CAFA to open federal-court doors and ensure that "interstate cases of national importance" were litigated in a federal forum, free from the state-court biases out-of-state defendants were forced to endure. *Johnson v. Advance America*, 549 F.3d 932, 935 (4th Cir. 2008), citing CAFA § 2(b)(2). CAFA dispensed with the traditional requirement of complete diversity, opting instead to require only minimal diversity for federal court removal. 28 U.S.C. § 1332(d)(2)(A). It also permitted the removal of "mass actions," by deeming those actions "in which monetary relief claims

of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" to be class actions. 28 U.S.C. § 1332(d)(11)(A)-(B)(i).

Despite clear Congressional intent that mass actions such as the one at issue here be litigated in federal court, plaintiffs continue to find ways to keep these suits in state court where certification standards are more lax and a "home-court" advantage works to the demise of defendants. As exemplified by this case, one way plaintiffs can accomplish this is through improper use of the "parens patriae" doctrine. A doctrine of standing, parens patriae allows a state, typically through its attorney general, to bring suit to recover damages on behalf of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). However, it has become increasingly common for private plaintiffs' lawyers to team up with state attorneys general to pursue monetary claims of large numbers of people using the parens patriae label. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L.Rev. 913, 964-68 (2008) ("[I]n most...parens patriae litigation against product manufacturers, state attorneys general...have hired private attorneys, almost invariably chosen from a small cadre of sophisticated plaintiffs' mass products litigation firms..."). Even more alarming, these private plaintiffs' lawyers are working under contingency fee agreements – much like the contingency fee retention agreement in this case. Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf. As a result, private plaintiffs' lawyers purporting to represent the state seek to

maximize their fees rather than the public interest. David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423, 436 (2010). Permitting private class-action lawyers working on a contingent-fee basis to partner with state attorneys general in hopes of circumventing CAFA's minimal-diversity removal perpetrates the jurisdictional gamesmanship Congress sought to avoid in the first place and creates a host of problems.

Congress' intent to keep parens patriae actions within CAFA's reach is exemplified by its refusal to adopt an exclusion for removal of parens patrie actions. 151 Cong. Rec. S1157, 1158-59, 1165 (daily ed. Feb. 9, 2005). And yet Petitioner urges this Court to adopt a rule which would effectively rob defendants of CAFA's protections. DRI knows all too well the ramifications to defendants nationwide should they be forced to litigate mass actions that would otherwise be removed to federal court in a state forum. The threat of certification in a state forum places insurmountable pressure on out-of-state defendants to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Creative labeling should not allow private plaintiffs' lawyers, working in conjunction with state attorneys general, to circumvent the protections that CAFA intended to provide to defendants. But if this Court adopts the position advocated by Petitioner, this is exactly what will occur. Only by adhering to the Fifth Circuit's "claim-by-claim" approach can the judiciary prevent mass actions which belong in federal court from being adjudicated in a

state forum by attorneys general and private plaintiffs' lawyers - working under a contingent fee agreement - using the "parens patriae" label.

ARGUMENT

I. Through Its Enactment Of CAFA, Congress Intended That Mass Actions Such As The One At Issue Be Litigated In A Federal Forum, And That Plaintiffs' Lawyers Not Be Permitted To Circumvent Removal By Teaming Up With State Attorneys General And Labeling The Mass Action A "Parens Patriae" Action.

A. Congress intended the Class Action Fairness Act of 2005 to allow for a federal forum to curtail class action abuses, including gamesmanship by plaintiffs' counsel and others designed to defeat removal jurisdiction.

Congress' enactment of the Class Action Fairness Act of 2005 ("CAFA") ushered in a new era in diversity jurisdiction. Prior federal jurisdictional requirements mandated complete diversity for removal to federal court. In short, every plaintiff had to be diverse from every defendant. 28 U.S.C. § 1332(a). As a result, a great number of class suits were being tried in state courts. This, in turn, exposed defendants to a phenomenon known as "homecooking" – bias that out-of-state defendants experience when forced to litigate in plaintiff-friendly state courts. Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 550 (Winter 2012). As a

result of "homecooking," plaintiffs were more likely to have problematic classes certified and were more likely to receive higher damages awards. *Id.* The federal appellate circuits have uniformly confirmed this Congressional finding that state and local courts often act "in ways that demonstrate bias against out-of-State defendants[.]" CAFA § 2(a)(4), Pub. L. 109-2, § 2, 119 Stat. 4, 5 (2005), 28 U.S.C. § 1711 note., cited in *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675 (7th Cir. 2006); *Johnson v. Advance America*, 549 F.3d 932, 935 (4th Cir. 2008); *In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 564 F.3d 75, 80-81 (1st Cir. 2009).

Recognizing the abuses attendant with the current jurisdictional scheme, which largely fell on defendants, Congress passed CAFA to increase defendants' access to federal courts in class action lawsuits. Pub. L. No. 109-2 at § 2(b)(2) (2005). Simply stated, CAFA was enacted to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Johnson*, 549 F.3d at 935, citing CAFA § 2(b)(2). To achieve its broad jurisdictional goals, CAFA dispensed with the traditional requirement of complete diversity, opting instead to require only minimal diversity for federal court removal. 28 U.S.C. § 1332(d)(2)(A). Accordingly, CAFA permits removal when diversity of citizenship exists between any class defendant and any named or unnamed person on whose behalf the action is filed. *Id.*, § 1332(d)(1)(D).

Also, for the first time, CAFA permitted removal of civil actions "in which monetary relief claims of 100 or

more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(A)-(B)(i). Such "mass actions" are deemed to be "class actions" for removal purposes, provided the jurisdictional amount requirement is satisfied. *Id.*

CAFA's language reflects a clear purpose to facilitate, rather than hinder, removal of such mass actions of national importance. Indeed, CAFA was intended to extend federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005). To accomplish this purpose, CAFA loosened the rules governing removal of class actions and mass actions, to facilitate the uniform resolution of major multi-party disputes in federal court. A Congressional expansion of federal diversity jurisdiction is rare; CAFA marks the first time that Congress acted to *expand* diversity jurisdiction since it enacted the First Judiciary Act of 1789.

Despite CAFA's explicit intent to increase the ability of defendants to remove large interstate class and mass actions to federal court for adjudication, plaintiffs continue to manipulate their claims in order to avoid CAFA removal. See, e.g., *Lowdermilk v. U.S. Bank National Ass'n*, 479 F.3d 994, 998-99 (9th Cir. 2007) overruled on other grounds, 2013 WL 4516757 (9th Cir. 2013) ("[I]t is well established that the plaintiff is 'master of her complaint' and can plead to avoid federal jurisdiction."); Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 109 (2009) ("There is an

overwhelming fear of 'gamesmanship' on the part of plaintiffs' lawyers to avoid federal diversity jurisdiction.") Some state attorneys general are engaging in similar efforts to evade CAFA's clear language and keep mass actions in state court, which they perceive to provide a more favorable forum for the state attorney general acting on behalf of local citizens. Even more alarming, attorneys general and private plaintiff class action lawyers are joining forces, through contingency fee agreements, to circumvent removal of these mass actions that rightfully belong in a federal forum. This case is but one example of how some state attorneys general and private plaintiff class action attorneys are joining forces to evade CAFA's jurisdictional reach.

B. It is increasingly common for state attorneys general - acting through plaintiff class action lawyers with contingency fee agreements - to bring mass actions in state courts as parens patriae actions.

The "parens patriae" doctrine recognizes the principle that a state, when a party to a suit involving a matter of sovereign or quasi-sovereign interest, represents all of its citizens and therefore has standing. 72 Am. Jur. 2d States, Etc. § 94 (2013). An exception to the normal standing rules, the parens patriae standing doctrine allows a state to bring suit and recover damages for its quasi-sovereign interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). Common law parens patriae standing simply means that a State has "an injury to what has been characterized as a 'quasi-sovereign' interest." *Id.* at 601. A practice "long

embedded in Anglo-American law," the parens patriae action has "expanded in this century." *Com. of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc.*, 632 F.2d 365, 368 (4th Cir. 1980), citing *Louisiana v. Texas*, 176 U.S. 1 (1900), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). See also Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122, 132-33 (2011) ("[P]arens patriae...has been an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.").

Parens patriae actions share much in common with damages class actions. Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 499-500 (2012) ("[P]arens patriae and other public actions...share much in common with damages class actions...Like class actions, representative suits by state attorneys general adjudicate the rights of individuals who play no direct role in the conduct of the case."). But they are unique in at least one major respect – they allow for state attorneys general to label what are really class or mass actions as parens patrie actions in an effort to avoid federal court removal. This is so even though CAFA does not exclude "parens patriae" actions.

It is increasingly common for state attorneys general to pursue monetary claims of large numbers of people using the parens patriae label. For example, in *Nevada v. Bank of America Corp*, 672 F.3d 661, 670 (9th Cir. 2012), the Nevada Attorney General brought a parens patrie action in state court to protect "the hundreds of thousands of homeowners in the state"

allegedly deceived by the bank. Again, in *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F.Supp.2d 441 (E.D. Pa. 2010), the State of West Virginia attorney general sought to adjudicate claims of 89,000 premium cable subscribers under the parens patriae doctrine. In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 421 (5th Cir. 2008), the attorney general for the State of Louisiana, along with counsel from a number of private law firms, filed a state court lawsuit on behalf of claims of policy holders of six insurance companies, styled as a parens patriae action. The attorney general of West Virginia brought a parens patriae action in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 748 F Supp. 2d 580, 589-90 (S.D. W. Va. 2010), on behalf of consumers against six defendants for excess charges paid for generic drugs. See also *Mississippi ex rel Hood v. Entergy Miss., Inc.*, No. 3:08-cv-780-HTW-LRA, 2012 WL 3704935, *9 (S.D. Miss. Aug. 25, 2012) ("*Entergy*") (claims of electric utility consumers).

In most parens patriae actions, the attorney general retains private counsel to manage and try the cases on behalf of the state. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L.Rev. 913, 964-68 (2008) ("[I]n most...parens patriae litigation against product manufacturers, state attorneys general...have hired private attorneys, almost invariably chosen from a small cadre of sophisticated plaintiffs' mass products litigation firms..."). Most of the time, private plaintiffs' firms are brought in on a contingency-fee basis. 126 Harv. L. Rev. at 493, 498, 524 ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned class

action..."[A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis."). This was first seen in the tobacco litigation of the 1990s, where trial attorneys received $14 billion nationally in attorney fees under the $246 billion Tobacco Master Settlement Agreement. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront To The Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588 (Summer 2009).[2]

Since then, state attorneys general have continued to hire private class action attorneys to represent government interests through contingency fee contracts. In Rhode Island, for example, the attorney general used private plaintiffs' lawyers to represent the state in a fight against former lead paint manufacturers spanning a five-year period. See *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008). Similarly, in *Oklahoma ex rel Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ (N.D. Okla.), Oklahoma's attorney general retained three private plaintiffs' firms on a contingency fee basis to sue the poultry industry for polluting the state's waters. In that case, the fee contract guaranteed private counsel at least one third of the total value of any monetary damages recovered, but allowed for recovery of up to 50%. (Motion of Tyson Foods, Inc. et al for Judgment

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[2] Similarly, a suit brought by the South Carolina attorney general after a 1996 river oil spill threatened to result in a $1.48 million fee to two private lawyers hired by the attorney general, even though the suit was quickly settled before pretrial discovery. John Monk, *Lawyers May Get $1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake or Reedy River Oil Spill in 1996*, The State (Columbia, S.C.), Nov. 17, 2000.

s a Matter of Law in Light of Plaintiff's Constitutional Violations at 2, *Oklahoma v. Tyson Foods, Inc.*, No. 05-cv-00329-GKF-SAJ (N.D. Okla Feb. 28, 2007). See also *County of Santa Clara v. Superior Court*, 235 P.3d 21, 25 (2010) (wherein public entities were represented both by their own government attorneys as well as several private law firms hired on a contingent-fee basis).

In this case, the Mississippi Attorney General entered into a contingency-fee retention agreement with a private law firm to file this action in state court against all out-of-state defendants. Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf (giving plaintiff's lawyer power to "investigate, research and file the Claims in any appropriate Court or Courts before any appropriate governmental agency.") The retention agreement sets forth a contingency fee schedule under which the private law firm stands to make millions of dollars, the precise amount based upon how much the State of Mississippi recovers and whether the case is resolved before or after the commencement of formal proceedings. (*Id.*, Exhibit "A", Counsel Retention Agreement, Matter Settled Prior to Initiation of Litigation, p. 5; Exhibit "B", Counsel Retention Agreement, Matter Resolved After Initiation of Litigation, p. 7). In addition, both contingent fee schedules operate cumulatively in order to provide the private plaintiffs' lawyer with a maximum recovery.

Permitting private class-action lawyers working on a contingent-fee basis to partner with state attorneys general in hopes of circumventing CAFA's minimal-diversity removal perpetrates the jurisdictional

gamesmanship Congress sought to avoid in the first place and creates a host of ethical problems. Private plaintiffs' lawyers purporting to represent the state but paid on a contingency fee basis seek to maximize their fees rather than the public interest, a phenomenon which even critics generally in support of contingency fee arrangements have recognized. David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423, 436 (2010). As one legal scholar stated, "[i]t is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue to the common good or the public interest than their counterparts in private practice[.]" Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 789 (2000). Private plaintiffs' lawyers bringing these parens patriae actions will likely steer the litigation in a direction that "places their own financial interests over those of their putative public supervisors and the public interest these officials are supposed to represent." 2010 Mich. St. L. Rev. at 442. Stated another way, rather than "do the right thing" for the State's citizens, private plaintiffs' lawyers may control parens patriae actions in a manner which seeks to maximize recovery under their retention agreements.[3] In testimony before the

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[3] Additionally, some have questioned whether attorneys general act within their statutory authority when appointing plaintiffs' lawyers to act as "special attorneys general." David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423 (2010).

Subcommittee on the Constitution of the Committee on the Judiciary, the Honorable Bill McCullum expressed a related concern: "I am also very concerned that, when state attorneys general elect to retain contingent fee plaintiff counsel to pursue litigation on behalf of the state, there is a substantial risk of, and opportunity for, 'pay-to-play' schemes and other types of abuse in which political contributions from plaintiff firms are traded for contingent fee contracts." (Testimony of the Honorable Bill McCullum on Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, Feb. 2, 2012).

Because state attorneys general are compensated on a salary basis and do not retain fees as personal profit, these ethical concerns are eliminated when private plaintiffs' lawyers are not part of a parens patriae suit. "At best, the fees go to fund future enforcement efforts by the attorney general's office. Thus...[public attorneys] do not share private counsels' strong incentives to maximize their fees." 126 Harv. L. Rev. 517. Accordingly, the "government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved" remains intact. *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351(Cal. 1985).

In contrast, contingency fee arrangements have been said to validate "private attorneys who are clothed with the mantle of state authority, but who are unrestrained by the constitutional checks and ethics obligations on the exercise of that authority." Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront To The Neutrality Doctrine?*,

42 Colum. J.L. & Soc. Probs. 587, 595 (Summer 2009). Accordingly, some courts are disallowing use of contingency fee agreements in parens patriae actions. The Louisiana attorney general hired private law firms to investigate and prosecute environmental damages claims in *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997); however, the Louisiana Supreme Court struck down the contingency fee arrangement. In 2007, the Superior Court of California considered whether a county attorney could hire a contingency fee attorney to represent the county in litigation. *Santa Clara v. Atl. Richfield Co.*, No. 1-00-cv-788657, slip op. at 2, (Cal. Super. Ct. Apr. 4, 2007). Ultimately, the court held that outside counsel must be precluded from operating under a contingency fee arrangement on behalf of the government. *Id.* The Supreme Court of California subsequently held that public entities were not categorically barred from engaging private counsel under contingent fee arrangements, but that retainer agreements must specify matters that contingent-fee counsel must present to government attorneys for decision. *County of Santa Clara v. Superior Court*, 235 P.3d 21, 40 (2010).

In the federal system, this practice is not allowed. President George Bush signed an executive order in 2007 forbidding the federal government from entering into contingency fee agreements. John O'Brien, Bush Bans Contingency Fee Arrangements, LEGAL NEWSLINE, May 17, 2007, http://legalnewsline.com/news/195296-bush-bans-contingency-fee-arrangements. See also Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007). President Obama's administration has retained this policy. However, as discussed above, this has become a prevalent practice in the state court

system. This trend is only expected to increase in the future. Myriam Giles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 675 (2012) ("Parens patriae litigation...poised for a qualitatively new role in the enforcement landscape"). Accordingly, the time is ripe for this Court to issue a ruling which will prevent private plaintiffs' lawyers, working with a contingency-fee agreement, to team up with state attorneys general to bring mass actions under the guise of parens patriae to defeat Congress' intention that cases of national importance be litigated in a federal forum.

C. If state attorneys general, working in concert with plaintiff class action attorneys, are permitted to evade a federal forum by calling mass actions parens patrie actions, this Court will be adopting a rule contrary to Congressional intent and the plain language of CAFA, and which will cause a host of problems for defendants.

Petitioner asks this Court to adopt a rule that, in application, threatens to rob defendants of CAFA's protections. Stated another way, if this Court permits state attorneys general to bring large scale class actions using private plaintiff attorneys as special attorneys general under the label of parens patriae, the result will be a gaping exception to the removal power that Congress did not intend. When Congress debated amendments to CAFA, one of the major concerns was whether CAFA should apply to actions filed by state attorneys general. 151 Cong. Rec. S1157, 1158-59 (daily ed. Feb. 9, 2005). Nearly all of the fifty states' attorneys general advocated in favor of an exclusion for

parens patriae actions. *Id.* However, the Senate considered and rejected such an amendment. *Id.* at S1165. In Congress' view, parens patriae actions must be within CAFA's reach; otherwise, plaintiffs' lawyers and state attorneys general could circumvent removal to federal court simply through creative labeling. As Senator Hatch expressed, exempting actions by state attorneys general from removal would "create a loophole that some enterprising plaintiffs' lawyers [would] surely manipulate in order to keep their lucrative class action lawsuits in State court [and that]...it [would] not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to...lend the name of his or her office to a private class action." *Id.* at 1163-64 (quoted in *Caldwell*, 536 F.3d at 424). Characterizing the loophole that would be created by such an exception as "big enough to drive a truck though," Senator Cornyn aptly noted that this "could cause substantial mischief" CAFA was intended to prevent. *Id.* at S1161.

DRI knows all too well the ramifications to defendants nationwide should they be forced to litigate mass actions that would otherwise be removal to federal court in a state forum. Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) ("[E]mpirical studies...confirm what most class action lawyers know to be true[.]"); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to]

settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class and mass actions place defendants in the untenable position of betting the company on the outcome of a trial.

Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). This is particularly true where out-of-state defendants are forced to litigate a mass action, labeled as a parens patriae action, in state courts that are clearly biased against defendants. During CAFA debates, the House Committee on the Judiciary noted research showing that some "magnet" State courts have demonstrated "a lax attitude toward class certification standards, a disregard for fundamental due process requirements, and a willingness to 'rubber-stamp' class action settlements that offer little if anything to the class members while enriching their lawyers." H.R. REP. 108-144, *8 (2003).

Adopting the position advocated by Petitioner will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). In short, by creating a gaping exception in removal power that Congress did not intend, out-of-state defendants will be forced to litigate what are really "mass actions" in state court, with all the attendant "home-court" biases working against defendants who have a statutory right to present their defenses in a federal forum. Creative labeling should not allow private plaintiffs' lawyers, working in conjunction with state attorneys general, to circumvent the protections that CAFA intended to provide to defendants. But if this Court adopts Petitioner's argument, this is exactly what will occur. In turn, this will allow abusive mass actions to progress more easily to certification – and legally unwarranted settlement. And the enhanced promise of a pay-off would trigger the filing of many more lawsuits, including "strike suits" brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996).

The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated. Even before the rise of parens patriae mass actions, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current

economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). But allowing a state attorney general to circumvent removal of a mass action by using the parens patriae doctrine gives even more power in upfront settlement discussions to plaintiffs. "Such leverage can essentially force corporate defendants to pay ransom..." S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). This is completely at odds with the very purpose of CAFA.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully urges the Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
PETITIONER,

v.

AU OPTRONICS CORP., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* STATE OF ILLINOIS AND 45 OTHER STATES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The "'prerogative of *parens patriae*'" is "'inherent in the supreme power of every state'" and allows each State to pursue litigation aimed at protecting "the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 602 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)). States often rely on *parens patriae* authority when writing statutes—and filing suit to enforce those statutes—in areas of the law ranging from environmental protection and civil rights to, as in this case, antitrust and consumer protection. In its decision below, however, the Fifth Circuit imposed a novel limit on *parens patriae* authority. That court ruled that, if a *parens patriae* action seeks restitution for injured state residents (among other remedies), it is no longer a *parens patriae* action at all, but is instead a "mass action" subject to compelled removal to federal court under the Class Action Fairness Act of 2005 ("CAFA"). See 28 U.S.C. § 1332(d)(11).

The Fifth Circuit's approach forces States to litigate in federal court cases they bring in their own courts, under their own laws, for conduct occurring within their own borders. Worse, this approach encourages federal courts to override a State's determination that a particular action and mode of relief will serve the public interest. At the same time, the Fifth Circuit's rule has absurd practical consequences for the State as litigant and for the proper construction and consistent application of state law.

Because the decision below upends entrenched principles of federal-state comity and yields absurd results in practice, the *amici* States urge this Court to

reverse that decision and hold that Mississippi's *parens patriae* suit was not a mass action subject to federal removal under CAFA.

STATEMENT

The doctrine of *parens patriae* allows a State to sue to protect the interests of its residents. See *Alfred L. Snapp & Son,* 458 U.S. at 602 (explaining that States may bring civil lawsuits based upon "a set of interests that the State has in the well-being of its populace"). A State's properly asserted *parens patriae* action "must be deemed to represent all of [that State's] citizens." *New Jersey v. New York*, 345 U.S. 369, 372-373 (1953). And a lawsuit brought by a State to protect "the health and well-being—both physical and economic—of its residents in general" is a valid *parens patriae* action, so long as the State has an interest in the case "apart from the interests of particular private parties." *Alfred L. Snapp & Son*, 458 U.S. at 607.

Relying on its *parens patriae* authority, the State of Mississippi brought a civil action against respondents, manufacturers and distributors of liquid crystal display ("LCD") panels, in Mississippi state court alleging that respondents had fixed the prices of those panels in violation of the Mississippi Antitrust Act, Miss. Code Ann. §§ 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1 *et seq*. Pet. App. 24a.[1] In its complaint, Mississippi sought a

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[1] The issue in this case is whether Mississippi's lawsuit was removable under CAFA. The *amici* States take no position as to whether Mississippi law allowed Mississippi to pursue a *parens patriae* claim in this case, which is a question for the state court to address on remand.

permanent injunction, civil penalties, and punitive damages, as well as restitution to the State, local governments, and Mississippi residents for losses incurred from the purchase of LCD panel products. Pet. App. at 25a-26a.

Mississippi was not alone. Private indirect purchasers sued in a consolidated multi-district litigation ("MDL") in the Northern District of California based on the same alleged price-fixing scheme. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827 (N.D. Cal. filed Apr. 20, 2007). Twelve other States filed their own lawsuits against many of these same respondents.[2] Four of those twelve States commenced their actions in their respective state courts and asserted only state-law claims. And like Mississippi, those States sought restitution for injured residents in tandem with claims for injunctive relief, civil penalties, and punitive damages.[3]

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[2] See *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Kroger v. AU Optronics Corp.*, No. 3:10-cv-4346 (N.D. Cal.); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics*, No. 10 CH 34472 (Cir. Ct. of Cook Cnty.); *Washington v. AU Optronics*, No. 10-2-29164-4 (King Cnty. Super. Ct.).

[3] See Compl. for Damages and Injunctive Relief (Dkt. 1), *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct. filed Oct. 15, 2010); Compl., *Illinois v. AU Optronics*, No. 10 CH 34472 (Cir. Ct. of Cook Cnty. filed Aug.

In the decision below, breaking with every other federal court of appeals to consider the issue,[4] the Fifth Circuit held that Mississippi's suit was a "mass action" partially brought to vindicate individual interests and thus subject to federal removal under CAFA. Pet. App. 5a. The court based its analysis principally on its prior decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Company*, Pet. App. 4a, which held that federal courts may "'pierce the pleadings'" to determine whether a State's claim "'has been fraudulently pleaded to prevent removal,'" 536 F.3d 418, 425 (5th Cir. 2008) (quoting *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175 (5th Cir. 1995)). The court in *Caldwell* drew from this Court's observation in *Alfred L. Snapp & Son* that a State cannot proceed as *parens patriae* when it "is only

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10, 2010); Ex. A. to Notice of Removal (Dkt.1-1), *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731-JFA (D.S.C. filed Mar. 25, 2011); Compl. for Injunction, Damages, Restitution, Civil Penalties and Other Relief Under the Washington State Consumer Protection Act, RCW 19.86, *Washington v. AU Optronics*, No. 10-2-29164-4 (King Cnty. Super. Ct. filed Aug. 11, 2010).

[4] See *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3427 (U.S. Jan. 23, 2013) (No. 12-911); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); see also *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 218-220 (2d Cir. 2013) (rejecting Fifth Circuit's "claim-by-claim" approach in rejecting argument that *parens patriae* action is removable as a "class action" under CAFA); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 849-850 (9th Cir. 2011) (rejecting argument that *parens patriae* action is removable as a "class action" under CAFA).

acting as a nominal party" in holding that a State does not have its own, freestanding interest in restitution on behalf of one of its residents, and that a complaint asserting such an interest is pleaded fraudulently. *Id.* at 426 (citing *Alfred L. Snapp & Son*, 458 U.S. at 607). Judge Southwick dissented in *Caldwell*, however, arguing that it is not for a federal court to "force [a State] to litigate in the posture of a plaintiff in a mass action." *Id.* at 434 (Southwick, *J.*, dissenting).

Relying on the narrow conception of state interest articulated in *Caldwell*, the decision below held that because Mississippi's complaint sought restitution for its residents, Mississippi was not proceeding as *parens patriae*. Pet. App. 7a. It declared that a State acts as *parens patriae* only if it is the sole party in interest in a civil action. Pet. App. 7a-8a. As a result, the Fifth Circuit held that Mississippi's complaint was a fraudulently pleaded multi-party action for private damages that qualified as a mass action under CAFA. Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

Petitioner's brief explains the many ways in which CAFA's text and purpose make clear that CAFA does not authorize the removal to federal court of *parens patriae* actions alleging violations of state law. In this brief, State *amici* highlight two critical implications of the Fifth Circuit's ruling to the contrary, each of which is important to understanding that court's error in interpreting CAFA.

First, the removal to federal court of a state *parens patriae* action brought under state law in a state court based on in-state conduct is an affront to established

principles of federal-state comity. This Court has long recognized that forcing an unwilling State to proceed in federal court infringes upon that State's sovereign dignity. See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 715, 748 (1999); *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). For that reason, the Court has expressed reluctance "to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983). Yet that is precisely what the Fifth Circuit authorized here, and it did so without any clear indication that Congress intended that result.

That affront to the sovereign dignity of the State is compounded by the intrusion it represents into the sovereign "prerogative" of *parens patriae*. *Alfred L. Snapp & Son*, 458 U.S. at 600. By holding that Mississippi was not proceeding as *parens patriae* for at least some of its claims, the Fifth Circuit implicitly overruled Mississippi's determination that this litigation would be in the public interest. But "[a]s a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Id.* at 612 (Brennan, *J.*, concurring). Thus, the decision of the court below to overturn a State's determination of the public interest is a further affront to the deference federal courts owe to the States as sovereign bodies.

Second, this lack of deference has several real-world effects. If the Fifth Circuit's rule were extended nationwide, numerous unsettled questions of state law would be channeled into the federal courts, which lack authority to render controlling pronouncements on those issues. Given the understandable reluctance expressed by many federal courts to announce

innovative interpretations of state law, this would stunt the development of legal doctrine in areas of great public interest. Requiring the adjudication of complex issues of state law in federal court also would increase the threat that similarly situated parties would receive differential treatment. These results would be felt in numerous areas, ranging from mass torts, civil rights, and environmental claims to the sorts of consumer fraud and antitrust actions at issue here.

Moreover, treating *parens patriae* suits as mass actions would be an administrative nightmare under CAFA. In a CAFA mass action, only those individuals with claims exceeding $75,000 may be removed to federal court. The decision below thus would require federal courts to (1) identify the unnamed beneficiaries of the State's enforcement action, (2) determine which, if any, have incurred damages in excess of $75,000, and (3) remand the claims of those who do not meet the amount in controversy requirement to state court. And CAFA would require all of this without offering federal district courts any mechanism for undertaking these tasks. Furthermore, in most cases the only party with a direct claim to more than $75,000 would be the State, meaning that, ironically from a comity perspective, only the State would be compelled to litigate its claims in federal court.

To make matters worse, CAFA authorizes transfer of a mass action from one federal court to another only if a majority of the plaintiffs consent. Thus, if an MDL has been convened, the court must obtain consent to transfer from a majority of all plaintiffs to a mass action with claims exceeding $75,000 (although there is no mechanism to identify these parties or to poll their preferences), and, if they do not consent, CAFA removal

would result in three courts litigating claims arising under a single State's law: an MDL court, for cases originally filed in federal court and completely diverse private party claims originally filed in state court; a second federal district court, for the claims removed as a mass action; and state court, for remanded claims.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING INTERFERES WITH STATES' SOVEREIGN RIGHT TO BRING *PARENS PATRIAE* ACTIONS TO ENFORCE THEIR OWN LAWS IN THEIR OWN COURTS.

The Constitution left "to the several States a residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed., 1961) (J. Madison). Among the "easily identifi[able]" interests a sovereign may pursue is "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which includes "the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601.

In this case, Mississippi pursued an action in state court to enforce its own antitrust and consumer fraud statutes. Still, the Fifth Circuit held that respondents could force the State to proceed with its claims in federal court, without any clear indication that Congress intended this result. Principles of federal-state comity dictate that, for Congress to create the state-sovereignty defeating rule the Fifth Circuit identified, CAFA must include a clear statement to that effect.

1. By any standard, the Fifth Circuit's decision cannot be reconciled with the sovereign "dignity" States

"retain" as "joint participants in the governance of the Nation." *Alden*, 527 U.S. at 715, 748. This Court repeatedly has recognized that forcing an unwilling State to proceed in federal court undermines its dignity as a sovereign. See, *e.g.*, *id.* at 715-718; *Hans*, 134 U.S. at 12; see also *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1645 (2011) (Roberts, *C.J.*, dissenting) (observing that "any time a State is haled into federal court against its will, 'the dignity and respect afforded that State * * * are placed in jeopardy'" (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997))). But that is precisely what happened here. Mississippi did not consent to litigate its claims in federal court, yet it must do so under the Fifth Circuit's rule.

That affront to Mississippi's dignity as a sovereign is all the more acute here because this case does not present any question of federal law. Mississippi seeks merely to enforce its own laws. As the Fourth Circuit observed in parting from the Fifth Circuit's rule, a declaration that a "State was not entitled to pursue its action in its own courts" would "inappropriately transform[] what is essentially a [state] matter into a federal case." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011). There can be little doubt that such a transformation would "trampl[e] the sovereign dignity of the State" that made the choice to assert a claim under its own laws in a state forum. *Ibid.*

The decision below thus runs afoul of the "proper respect for state functions" that this Court requires. *Younger v. Harris*, 401 U.S. 37, 44 (1971). This "preference" for "comity" is well established, *Allen v. McCurry*, 449 U.S. 90, 96 (1980), for this Court long ago

acknowledged its "duty * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States," *Taylor v. Carryl*, 61 U.S. 583, 595 (1857). Comity is "a bulwark of the federal system," *Allen*, 449 U.S. at 96, that is "'essential to the federal design,'" *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)).

Comity counsels federal courts to "endeavor" to avoid "undu[e] interfere[nce] with the legitimate activities of the States." *Younger*, 401 U.S. at 44. Federal courts must be "reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd.*, 463 U.S. at 21 n.22. And that is particularly true where, as here, a State seeks only to enforce its own laws in its own courts. Absent a clear federal interest in such an effort, federal courts must "forebear[]" and "avoid[] interference" with their state counterparts. *Covell v. Heyman*, 111 U.S. 176, 182 (1884).

Of course, the question presented in this case is whether Congress intended the anomalous result reached by the Fifth Circuit. But the foundational importance of state sovereignty and comity play a leading role in that analysis, for this Court has cited these considerations as the foundation for the rule that all removal statutes be "strictly construed." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); see also *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010) (applying strict construction of removal statutes in CAFA context). And those factors take on even

greater significance when one of the parties is a State. See *Franchise Tax Bd.*, 463 U.S. at 21 n.22.

Indeed, this Court has long required an unambiguous declaration of legislative intent before it construes a Congressional enactment to intrude on state sovereignty. See *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-544 (2002). Like removal statutes, for example, federal laws purporting to abrogate a State's immunity from suit in federal or state court must include a "clear statement" to that effect. *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (federal court); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (state court). Similarly, this Court has recognized a "presumption" against federal preemption of state laws in areas traditionally regulated by the States. *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013). These rules all follow from the principle that federalism requires federal courts to "respect * * * the States as 'independent sovereigns in our federal system.'" *E.g. Wyeth v. Levine*, 555 U.S. 555, 565-566 n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Nothing in CAFA's language clearly subjects Mississippi's action to federal removal. And if one were to go beyond CAFA's text and consider its legislative history, that history shows that Congress did not intend to remove state *parens patriae* actions. See 151 Cong. Rec. S1157, 1162 (Feb. 9, 2005) (Senator Cornyn explaining that "when State law * * * specifically provide[s] for the right of * * * a State attorney general, to sue on behalf of his State's citizens," CAFA "will not in any way impede that endeavor"); accord *id.* at 1161 (statement of Senator Carper); *id.* at 1163 (statements of Senators Grassley and Hatch); *id.* at 1164 (statement

of Senator Pryor); *id.* at H746 (Feb. 17, 2005) (statement of Representative Sensenbrenner). As the Fourth Circuit has explained, considerations of comity and state sovereignty should make federal courts "most reluctant to compel such removal, reserving its constitutional supremacy only for when removal serves an overriding federal interest." *CVS Pharmacy*, 646 F.3d at 178. There is no such interest here.

2. The weight of a State's dignitary interest is all the more profound where, as here, a State is exercising its *parens patriae* authority.[5] This capacity—literally meaning "parent of the country"—derives from the English legal system and has long been understood as "inherent in the supreme power of every state." *Mormon Church*, 136 U.S. at 57. By any measure, it is a critical component of state authority. Perhaps most importantly, moreover, it is what allows a State to pursue litigation aimed at protecting "the well-being of its populace." *Alfred L. Snapp & Son*, 458 U.S. at 602.

To exercise *parens patriae* authority, a State need only possess a quasi-sovereign interest in the case. As this Court has explained, "a State has a quasi-sovereign interest in the health and well-being—both physical *and economic*—of its residents in general." *Id.* at 607 (emphasis added). Thus, States have a legitimate public

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[5] While *parens patriae* authority has its roots in the common law, modern state legislatures frequently draw upon it in crafting enforcement mechanisms for their public interest statutes. See, *e.g.*, 740 Ill. Comp. Stat. 10/7(2) (2010) (Illinois Antitrust Act authorizing Attorney General to "bring an action in the name of this State, as *parens patriae* on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law").

interest in securing an honest marketplace for their residents. See *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 671 (9th Cir. 2012); see also *Georgia v. Penn. R. Co.*, 324 U.S. 439, 450-451 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected").[6]

Nor is that interest diminished because a limited portion of the public also suffers directly from an unfair practice. See, *e.g.*, *Alfred L. Snapp & Son*, 458 U.S. at 609 (Puerto Rico properly relied on *parens patriae* authority to assert discrimination in employment claim involving 787 temporary job opportunities out of population of nearly 3 million Puerto Rican residents); *New York v. 11 Cornwell Co.*, 695 F.2d 34, 39-40 (2d Cir. 1982) (injury to fewer than twelve persons sufficient to support *parens patriae* authority because similarly situated persons could be affected in the future), vacated on other grounds, 718 F.2d 22 (2d Cir. 1983) (*en banc*). Instead, courts must look beyond the direct effects of an unfair trade practice and consider "the indirect effects of the injury * * * in determining

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[6] Numerous district courts also have acknowledged that the States' quasi-sovereign interest in protecting the economic well-being of their residents permits the States to exercise their *parens patriae* authority to secure an honest marketplace within their borders. See *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1050-1051 (C.D. Ill. 2009); *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 543-544 (S.D. Miss. 2006); *Wisconsin v. Abbott Labs.*, 341 F. Supp. 2d 1057, 1062-1063 (W.D. Wisc. 2004); *Missouri ex rel. Webster v. Freedom Fin. Corp.*, 727 F. Supp. 1313, 1317 (W.D. Mo. 1989); *Maine v. Data Gen. Corp.*, 697 F. Supp. 23, 25 (D. Me. 1988); *New York v. Gen. Motors Corp.*, 547 F. Supp. 703, 707 (S.D.N.Y. 1982).

whether the State has alleged injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son*, 458 U.S. at 607.

Because of the indirect effects unfair trade practices have on the marketplace as a whole, States have a quasi-sovereign interest in promoting a smoothly functioning economy, free of anticompetitive conduct, see *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1024-1028 (5th Cir. 1983); *Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 131 (4th Cir. 1983), and in shielding the public from fraud, see *In re Edmund*, 934 F.2d 1304, 1311 (4th Cir. 1991). This is particularly true where the individual injury is small or diffuse, making it unlikely that anyone would litigate to obtain relief. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (observing that "individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small").

Undeniably, States view a competitive marketplace as an important public interest. Nearly every State has antitrust legislation to promote fair competition within its borders. The same is true of statutes prohibiting consumer fraud and deceptive trade practices. And in nearly every case, the States have vested at least partial responsibility for enforcing those laws with their respective Attorneys General. So it should come as no surprise that many States have whole divisions of their legal departments staffed by lawyers specializing in public interest litigation whose work is dedicated to bringing enforcement actions the State considers to be in the public interest. In fact, as explained, see *supra* p. 3, numerous States have brought lawsuits challenging the very conduct at issue in this case, either relying on

their own legal staff to do so or, in some instances, by overseeing outside counsel.

Thus, an action brought pursuant to one of these statutes is, by its very nature, an action a State deems to be in the public interest. That determination should receive deference. "As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring); see also *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (federal-court abstention that avoids deciding cases of important state policy is favored to maintain "harmonious federal-state relations in a matter close to the political interests of a State").

To be sure, this Court has resisted attempts to invoke *parens patriae* standing when a State was "merely litigating * * * the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (*per curiam*); see also *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). But those cases arose in the context of a State's attempt to invoke this Court's original jurisdiction. Thus, the rationale for questioning a State's assertion of public interest in those cases was that "if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated" and "the critical distinction, articulated in Art. III, § 2 of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate." *Pennsylvania*, 426 U.S. at 665-666. Surely that concern

has no relevance when a State proceeds against a private party.

Thus, there is likely a distinction between the quasi-sovereign interest sufficient to invoke this Court's original jurisdiction and one sufficient to proceed as *parens patriae* in an action against a private party. See *Alfred L. Snapp & Son*, 458 U.S. at 603 n.12 ("Admittedly, the discussion here and in other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdiction of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court."); *id.* at 611 (Brennan, *J.*, concurring) (emphasizing that requirements of Court's original jurisdiction and Eleventh Amendment raise "concerns that might counsel for a restrictive approach to the question of *parens patriae* standing" that are not present when a State sues a private party); see also *Pennsylvania*, 704 F.2d at 131 n.13 (distinguishing between "quasi-sovereign interest" for purposes of this Court's original jurisdiction and "public interest" for purposes of *parens patriae* standing).

So, at a minimum, it seems clear that unless a State is seeking to invoke this Court's original jurisdiction, federal courts should exercise caution before overriding a State's determination that it is advancing a substantial public interest by bringing an action to enforce state law. See *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring) ("I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the

substantiality or legitimacy of a State's assertion of sovereign interest.").

3. Nevertheless, the Fifth Circuit chose to substitute its judgment for Mississippi's by declaring that Mississippi lacked a legitimate public interest in some of its claims. Pet App. 5a. And the court did so, not because it disputed that States have an interest in the economic well-being of their residents, but because some of the remedies Mississippi sought would also benefit individual residents directly. Pet App. 7a.

As an initial matter, however, that some residents experienced greater harm from challenged conduct, and will potentially reap greater benefits from a State's suit, is inherent in all *parens patriae* actions. See *Pennsylvania v. Kleppe*, 533 F.2d 668, 674-675 (D.C. Cir. 1976) ("And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects."). Thus, a State need not establish that a defendant's action affects every resident equally to assert a valid *parens patriae* suit. See *Maryland*, 451 U.S. at 738-739 (States have *parens patriae* interest to contest another State's tax on natural gas even though impact of tax varies among individual residents). A State need only establish some interest in the relief sought, not that no private party has any interest in such relief. See *Kansas v. Colorado*, 533 U.S. 1, 8-9 (2001) (Eleventh Amendment prohibition on suits by residents of one State against another State does not prohibit Court from awarding damages based on harm to individual farmers in suit between States); see also *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (EEOC need not be class representative under Rule 23 to seek backpay for

private parties because when EEOC brings action, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination").

Yet more importantly, the Fifth Circuit's analysis is fundamentally at odds with a State's sovereign dignity. A State's judgment as to whether a particular remedy will serve the public interest is no less worthy of respect than its assertion of sovereign interest generally. Thus, to the extent judicial review of the assertion of sovereign interest is even permissible in a case that does not implicate this Court's original jurisdiction, but see *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring), judicial review is deferential and based on the "gravamen" of the complaint only, *Georgia*, 324 U.S. at 452; see also *In re State of New York*, 256 U.S. 490, 500 (1921) (whether suit is *parens patriae* action is judged "by the essential nature and effect of the proceeding, as it appears from the entire record").

This rule recognizes that when a sovereign State pursues a series of remedies, even if one of those remedies would inure to the benefit of particular residents, such relief may also promote that State's quasi-sovereign interest. See *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) ("That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings."), petition for cert. filed, 81 U.S.L.W. 3427 (U.S. Jan. 23, 2013) (No. 12-911); *Nevada*, 672 F.3d at 671 ("That individual consumers may also benefit from this lawsuit does not negate Nevada's substantial interest in this case." (internal quotation marks omitted)). In contrast, the

Fifth Circuit's rule establishes, in effect, that a judgment as to the public benefit of a remedy will be second-guessed as a matter of law if it benefits any individual consumers directly.

Indeed, if the rationale for the Fifth Circuit's practice of "piercing the pleadings" in a state-initiated action is that a party cannot defeat federal jurisdiction through "ill-practice" or "fraud," see *Caldwell*, 536 F.3d at 424, then the Fifth Circuit's decision implies that a State invoking its *parens patriae* authority to pursue restitution as a type of relief in an enforcement action is engaging in "ill-practice" or "fraud," see *id.* at 433-434 (Southwick, *J.*, dissenting). A sovereign entity's assessments of its own public interest deserves far greater respect than that. See *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring).

* * *

By construing Mississippi's *parens patriae* action as a CAFA mass action, the Fifth Circuit's rule represents a multi-layered intrusion upon the sovereign dignity of the States. It permits removal of an action brought in state court arising exclusively under state law regarding events occurring within that State to federal court. And it does so even though the only named plaintiff is a sovereign State. The rule announced below then disregards the quasi-sovereign interest the State has in securing an honest marketplace for its residents. And it allows federal courts to second-guess that State's evaluation of what promotes the interest of its citizenry.

Nothing about CAFA suggests that Congress sanctioned such a clear affront to "the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Absent a clear

indication of such an intention, there is no justification for the Fifth Circuit's decision.

II. THE FIFTH CIRCUIT'S RULE LEADS TO ABSURD RESULTS.

The consequences of the decision below are not merely abstract or academic. To the contrary, were this Court to endorse the Fifth Circuit's approach to CAFA removal, all federal courts would be required to entangle themselves in the resolution of numerous questions of state law in a wide array of subject areas. And the intricate rules of CAFA itself would make the administration of removed state-initiated enforcement actions unwieldy for the federal courts. In short, converting actions brought by States under state law in state court into federal actions would lead to a series of unworkable results that would only serve to further erode the sovereign dignity of the States.

A. The Fifth Circuit's Decision Steers State-Law Disputes Away From State Courts, Which Are Better Equipped To Resolve Them.

The decision below permitted respondents to remove Mississippi's suit, which asserted state-law claims only, to federal court on the theory that it was a mass action made up of numerous private claims fraudulently pleaded as a single *parens patriae* action. Pet. App. 7a-8a. If applied nationwide, the Fifth Circuit's rule will force States to litigate numerous state-law questions in federal court. Of course, the removal of state claims to federal court is one of CAFA's inherent byproducts. But the decision below will increase the volume of state issues that find their way to federal court. Moreover, those issues will be

concentrated in the meaning of laws designed by the States to promote the public's interests.

That result is not without consequences. "State courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), and "have the first and the last word as to the meaning of state statutes," *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). So a decision from a federal court on a question of state law "cannot escape being a forecast rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941); accord *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984) ("when a federal decision on state law is obtained, the federal court's construction is often uncertain and ephemeral"). That fact alone raises at least two administrative concerns.

First, the *Erie* doctrine requires federal courts applying state law to limit their efforts, "to the extent possible, to applying state law as it currently exists, not creating new rules or significantly expanding existing ones." *Nolan v. CN8*, 656 F.3d 71, 76 (1st Cir. 2011); accord *Barfield v. Madison Cnty.*, 212 F.3d 269, 272 (5th Cir. 2000). Accordingly, federal courts are "extremely cautious about adopting substantive innovation in state law." *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 608 (6th Cir. 2012) (internal quotation marks omitted); accord *Kingman v. Dillard's, Inc.*, 643 F.3d 607, 617 (8th Cir. 2011). This longstanding practice means that diverting the myriad questions that arise when interpreting state public interest statutes to federal court will stunt the development of those laws. For that reason, this Court has noted that it is "particularly desirable" for federal courts to reach results that will "permit a State court to have an opportunity to

determine questions of State law." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29 (1943).

Moreover, widespread application of the Fifth Circuit's rule will likely result in the unnecessary resolution of constitutional questions and, worse, in decisions striking down laws that state courts would have preserved with a saving construction. As this Court has observed, "[a]lmost every constitutional challenge" to a state law "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore*, 442 U.S. at 429-430. Because state courts need not follow *Erie*, they may adopt such constructions. See, *e.g.*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987) (had plaintiff asserted its claims in state rather than federal court, "it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions"). Federal courts, however, *are* bound by *Erie* and thus must avoid novel interpretations of state law. See *Nolan*, 656 F.3d at 76. They are thus poorly placed to interpret state statutes to avoid constitutional problems.

Second, steering issues of state law to federal court increases the likelihood that courts will treat similarly situated parties differently. Cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (*per curiam*) (holding that federal court should abstain in favor of state court resolution of issues of state law because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other" parties); *Burford*, 319 U.S. at 327-328 (recognizing that allowing federal

courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State polic[y]" and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). A federal court's construction of state law does not bind state courts. See *Moore*, 442 U.S. at 427. As a result, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted). Yet by routing more cases arising under state law to the federal courts, the Fifth Circuit's rule exacerbates the problem of inconsistent state-federal judicial outcomes.

Notably, each of these consequences will apply not only to claims arising under state antitrust and consumer protection statutes, but also in cases arising under many other state laws. States rely upon their *parens patriae* authority to bring a variety of enforcement actions. Chief among them are suits involving mass torts, see, *e.g.*, *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962-963 (E.D. Tex. 1997), environmental claims, see, *e.g.*, *Georgia ex rel. Hart v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), and civil rights, see, *e.g.*, *Massachusetts v. Bull HN Info Sys., Inc.*, 16 F. Supp. 2d 90, 102 (D. Mass. 1998). The decision below potentially would allow removal of actions brought by States to enforce state law in any of these areas if a private individual has a justiciable interest in the outcome. See Pet. App. 7a-8a (Mississippi not proceeding as *parens patriae* where it was not "sole party in interest"). The Fifth Circuit's

decision, therefore, may well presage the arrival of numerous state enforcement actions in the federal courts. If so, the development of state law will suffer as a result.

B. The Fifth Circuit's Decision Creates Complex Administrative Questions Under CAFA.

Treating actions filed as *parens patriae* enforcement actions as private mass actions also will give rise to duplicative, unwieldy litigation. CAFA defines a "mass action" as a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly * * * except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action" exceed $75,000. 28 U.S.C. § 1332(a), (d)(11)(B)(i). Construing that definition to reach actions brought originally by a State as the sole plaintiff creates a number of needless complexities.

First, the federal court would have to determine which unnamed, individual residents, if any, have claims exceeding $75,000. If the court could identify those unnamed plaintiffs, then the ones with claims that do not satisfy the amount-in-controversy requirement would be severed and remanded to state court.[7]

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[7] See *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1203-1207 & n.51 (11th Cir. 2007) (rejecting arguments that amount-in-controversy requirement (1) precludes exercise of federal jurisdiction over any individual claim in a mass action unless value of every claim in that mass action exceeds $75,000 and (2) allows exercise of federal jurisdiction over every claim in a mass action if value of any individual claim in that mass action exceeds $75,000, even if other claims valued at less than $75,000); Pet App. 52a-53a (district court decision relying on

Alternately, the federal court could keep a *parens patriae* action for the unnamed plaintiffs with claims that meet the amount-in-controversy requirement and then remand to state court a parallel *parens patriae* action for those with claims less than $75,000. In either case, in many state-initiated enforcement actions, the only party with a direct financial interest in excess of $75,000 will be the State itself. Thus, applying the mass action rule to a state enforcement action often will result in having only a single party forced to litigate its claims in federal court because of a defendant's removal under CAFA: the sovereign State.

Second, where, as here, an MDL has been convened, it is notable that CAFA bars transfer of a mass action from one federal court to another unless a majority of the plaintiffs consent. See 28 U.S.C. § 1332(d)(11)(C)(i). Application of that rule to a *parens patriae* action produces two undesirable results. First, if there are individuals other than the State with claims in excess of $75,000, they will be unnamed, and there is no obvious means for a federal court to identify them, contact them, and obtain their consent for transfer. Second, even if the federal court somehow manages to identify these individuals and request their consent, they may well refuse transfer. Thus, the Fifth Circuit's approach to CAFA removal creates the possibility (indeed, the likelihood, as this case shows) of claims under a single State's law proceeding in three courts simultaneously: (1) the MDL court, for cases originally filed in federal court and completely diverse private party claims originally filed in state court; (2) the federal district

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Lowery in discussing process of severing individual claims valued at less than $75,000).

court, as a result of removal under CAFA; and (3) the state court, for claims that did not meet the amount-in-controversy requirement for mass action removal. The net result is both a waste of judicial resources and an increase in the potential for inconsistent dispositions.

In short, the Fifth Circuit's rule effectively requires federal courts to rewrite a State's complaint as though it listed each and every claimant and then to apply procedural mechanisms that do not envision that redrafting, while forcing a State to litigate a mass action in spite of its professed intent to proceed as *parens patriae*. See *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-832 (2002) (plaintiff is "master of the complaint" and thus generally has the "choice of forum"). The result of this rewriting is burdensome and unworkable for both the parties and the courts. This Court has emphasized that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 130 S. Ct. at 1193. Yet it is difficult to conceive of a more complex administrative procedure than the one compelled by the decision below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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Supreme Court of the United States

STATE OF MISSISSIPPI EX REL. JIM HOOD,
ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR AMICI CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Pharmaceutical Research and Manufacturers of America, or PhRMA, is an association comprising the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA members are devoted to inventing products that allow individuals to live longer, healthier, and more productive lives. In 2012 alone, PhRMA members invested approximately $48.5 billion in discovering and developing new medicines—bringing the total such investment over the last decade to more than $380 billion. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates as amicus curiae in this Court. *See, e.g.*, *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, No. 12-398; *Mutual Pharm. Co.* v. *Bartlett*, No. 12-142; *Christopher* v. *SmithKline Beecham Corp.*, No. 11-204.

The American Bankers Association, or ABA, is the principal nationwide trade association of the U.S. banking industry. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional, and money-center banks. It also represents savings associations, trust companies, and savings banks. ABA members hold an overwhelming majority of the domestic assets of the U.S. banking industry. ABA frequently participates in litigation, either as a party or as amicus curiae, to protect and promote the interests of its members and the banking industry.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel made any monetary contribution to the preparation or submission of this brief. Letters of consent from the parties accompany the brief.

In recent years, amici's members have faced a marked increase in state-court litigation brought by state attorneys general in collaboration with private counsel. These lawsuits frequently bear many if not all of the hallmarks of class actions. Whether such cases can be removed to federal court under the Class Action Fairness Act, or CAFA, Pub. L. No. 109-2, 119 Stat. 4 (2005), is of great importance to amici and its members. Amici thus have a significant interest in the resolution of this case.

SUMMARY OF ARGUMENT

Amici agree with respondents' arguments for why the judgment below should be affirmed. In particular, amici agree that the Fifth Circuit's "claim-by-claim" approach to applying CAFA's removal provision for class actions and mass actions is compelled by both the statutory text and this Court's real-party-in-interest precedent. In contrast, the "whole case" approach adopted by other circuits is inconsistent with the text of CAFA, Congress's purpose in passing the statute, and this Court's decisions.

Amici will focus here, however, on a critical practical consequence of the "whole case" approach. In recent years, private class action counsel have increasingly solicited state attorneys general to lend their names to suits seeking monetary relief on behalf of allegedly injured state citizens. These private counsel pursue class relief on two fronts. On one front, they file private class action complaints against defendants. Sometimes those suits are dismissed in federal court on the merits, sometimes they settle. On a second front, the counsel solicit state attorneys general to file nearly identical actions in state court and under state law, apparently in hopes of avoiding the protections afforded

by CAFA. The case is brought against the same (out-of-state) defendant and seeks substantial monetary recovery for unidentified state residents. Though nominally brought by the attorney general, the litigation is managed almost entirely by private counsel who may be paid by the State on a contingency basis. Utilizing the *in terrorem* power of a suit with the attorney general as the named plaintiff, the private counsel generally seek to extract as large a settlement as possible from the defendants. The case is, in other words, a class action in all but name.

As the lower-court cases that have dealt with this phenomenon demonstrate, the "whole case" approach to CAFA makes it easier for plaintiffs employing this strategy to succeed in keeping the follow-on (i.e., putative attorney general) cases in state court. That result fails to respect Congress's purpose, in enacting CAFA, of ensuring that important class and mass actions are litigated in federal court. The Fifth Circuit's "claim-by-claim" approach, by contrast, which looks beyond labels to the substance of a suit, can put an end to this gamesmanship and thereby vindicate Congress's objectives.

ARGUMENT

I. CONGRESS ENACTED CAFA PRINCIPALLY TO ENSURE A FEDERAL FORUM FOR CLASS ACTIONS AND MASS ACTIONS OF NATIONAL IMPORTANCE

Congress passed CAFA to rein in "abuses of the class action device." CAFA § 2(a)(2), 119 Stat. at 4. According to the Senate report that accompanied the legislation, "[o]ne key reason for" these abuses was "that most class actions are ... adjudicated in state courts, where the governing rules are applied inconsistently ... and ... there is often inadequate supervi-

sion over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3. The report also observed that "current law enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Id.* Congress found that these abuses of class action lawsuits "harmed class members with legitimate claims," "adversely affected interstate commerce," "undermined public respect for our judicial system," and "undermine[d] the national judicial system" by "keeping cases of national importance out of Federal court." CAFA § 2(a)(2), (4), 119 Stat. at 4, 5. This Court has explained that remedying these problems—by "ensuring 'Federal court consideration of interstate cases of national importance'"—was "CAFA's primary objective." *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting CAFA § 2(b)(2), 119 Stat. at 5).

The mechanism by which Congress sought to achieve that "primary objective" was the expansion of federal diversity jurisdiction over class actions and mass actions. The statute establishes original jurisdiction—and thus removal jurisdiction—for "class actions" involving parties with minimal diversity. *See* 28 U.S.C. § 1332(d)(2).[2] CAFA defines removable class actions not only in technical terms—namely "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule," *id.* § 1332(d)(1)(B)—but also in functional terms, by requiring that "mass action[s]" be treated as "class action[s]

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[2] This new section 1332(d) was added to Title 28 by section 4(a) of CAFA, 119 Stat. at 9.

removable" under the statute, *id.* § 1332(d)(11)(A). A "mass action" is defined as "any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(B)(i).

Congress intended this new language to sweep broadly. Indeed, it was CAFA's aim "to move as many class and mass actions as possible to the federal courts." 13F Wright *et al.*, *Federal Practice and Procedure* § 3623 (2009); *see also* Schaerer, *A Rose By Any Other Name: Why A* Parens Patriae *Action Can Be A "Mass Action" Under the Class Action Fairness Act*, 16 N.Y.U. J. Legis. & Pub. Pol'y 39, 58-59 (2013) ("Congress intended CAFA to have a broad remedial purpose: to prevent litigants from keeping cases of national importance out of federal court." (footnote omitted)). As the accompanying Senate report explained, "new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions" and "[i]ts provisions should be read broadly, with a *strong preference* that interstate class actions ... be heard in a federal court if properly removed by any defendant." S. Rep. No. 109-14, at 43 (emphasis added).

In defining removable class actions and mass actions, Congress drew no distinction in CAFA between lawsuits initiated by private counsel and those filed by state attorneys general. In fact, Congress rejected an amendment to exempt lawsuits filed by attorneys general. *See* 151 Cong. Rec. S1157, S1165 (daily ed. Feb. 9, 2005). As one opponent explained, such an amendment would have "create[d] a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court," by "persuad[ing] a State attorney general to

simply lend the name of his or her office to a private class action." *Id.* at S1163, S1164 (statement of Sen. Hatch).

Although Congress rejected calls to exempt actions filed by state attorneys general, the "loophole" that some in Congress feared now exists in those circuits that follow a "whole case" approach and thus refuse to look at the substance of a state attorney general action in order to determine if it is in effect a class action. The Fifth Circuit's "claim-by-claim" approach is a vital tool in closing this loophole and thus advancing the purpose of CAFA. Indeed, the Fifth Circuit first adopted the "claim-by-claim" approach in a case that appeared to involve exploitation of the loophole. In *Louisiana ex rel. Caldwell* v. *Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), the court confronted a case that had initially been filed in state court, against several insurance companies, by the Louisiana attorney general. Citing the legislative history of CAFA discussed above, *see id.* at 424, the court of appeals noted that the attorney general was aided in the action by "a number of private law firms," *id.* at 421, including lawyers who had "filed, or attempted to file, nearly identical claims" in private class actions "as those alleged in [the] case by the state of Louisiana," *id.* at 423. The court then determined that it must "look to the substance of the action and not only at the labels that the parties may attach" in determining whether the suit was a removable class action under CAFA. *Id.* at 424. It is that approach, again, that is consistent with Congress's objective in enacting the statute.

II. THE "WHOLE CASE" INTERPRETATION OF CAFA HAS ENABLED THE PROLIFERATION OF DISGUISED CLASS ACTIONS BY STATE ATTORNEYS GENERAL AND NATIONAL CLASS ACTION FIRMS

CAFA has made great strides in achieving Congress's objective of ensuring a federal forum for class actions and mass actions of national importance. The "whole case" interpretation adopted by some circuits, however, threatens to roll back those accomplishments. Under the whole case approach, lawsuits nominally brought in state court by state attorneys general may avoid removal under CAFA even though the cases seek substantial monetary relief on behalf of a large number of individuals for a common alleged injury—and hence are class actions in all but name. *See AU Optronics Corp.* v. *South Carolina*, 699 F.3d 385 (4th Cir. 2012) (denying removal under whole case approach), *petition for cert. filed*, No. 12-911 (U.S. Jan. 23, 2012); *Nevada* v. *Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012) (same); *LG Display Co.* v. *Madigan*, 665 F.3d 768 (7th Cir. 2011) (same).[3]

Allowing such disguised class actions to remain in state court rips a wide hole in CAFA's protections, one that class action counsel have sought to exploit—in collaboration with state attorneys general. More specifically, in recent years "[s]ome state attorneys general have become increasingly overreaching ..., initiating

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[3] *See generally* Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 488 (2012) ("Public litigation by government actors plays a role similar to that of the private class action, collecting many claims into one suit and pursuing recovery for all. Although many public suits seek injunctive relief and other remedies that are unavoidably aggregate, others seek damages or restitution for identifiable individuals who have been injured by unlawful conduct.").

crusades against one industry after another, and often working in tandem with personal injury lawyers 'deputized' to file lawsuits on behalf of state government." U.S. Chamber of Commerce, Institute for Legal Reform, *State Attorneys General*.[4] Many of these lawsuits involve contingency-fee arrangements, and some are even awarded to private attorneys who have made significant campaign contributions to state officials. *See* U.S. Chamber of Commerce, Institute for Legal Reform, *Pay-to-Play Examples* (describing examples in Mississippi, Pennsylvania, West Virginia, Ohio, New Mexico, Massachusetts, and Rhode Island).[5] These cases, moreover, are often conceived by private attorneys and then "'shopped around' to various attorneys general in an effort to sign up as many states as possible."

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[4] *Available at* http://www.instituteforlegalreform.com/issues/state-attorneys-general-0 (last visited Sept. 9, 2013).

[5] *Available at* http://www.instituteforlegalreform.com/featuredtool/pay-to-play-examples-0 (last visited Sept. 9, 2013); *see also* Center for Legal Policy at the Manhattan Institute, *Trial Lawyers Inc.: A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011*, at 2 ("[S]tate attorneys general have become not just allies of the trial bar but, in many cases, indispensable to developing ... new lines of business [for plaintiffs' attorneys]. State AGs make possible the payment of windfall fees to their allies in the plaintiffs' bar, whose lawyers in turn gratefully fill the officials' campaign coffers with a share of their easily obtained cash."), *available at* http://www.triallawyersinc.com/TLI-ag.pdf (last visited Sept. 9, 2013); Nash *et al.*, *Beyond Due Process—A Litigation Primer: Challenging Attorney General and Other Government Contingency Fee Arrangements* at 1 (Institute for Legal Reform Jan. 2009) ("An increasing number of plaintiffs' attorneys are soliciting state Attorneys General ... to permit them to bring cases on behalf of state and local governments on a contingency fee basis."), *available at* http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/research/contingencyfeemanual.pdf.

Beisner *et al.*, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers* at 4 (Institute for Legal Reform May 26, 2005).[6] Under a "whole case" approach—under which removal could be denied based simply on the fact that the case was brought solely by a state attorney general—such a lawsuit could be kept in state court as long as counsel can convince a state attorney general to lend his or her name to it. That is improper because, as noted, these cases are in all important respects no different from class actions.

Amici can attest firsthand to the proliferation of this tactic, as their members have faced a striking increase in such lawsuits. The scenario often plays out as follows: On one front, private attorneys bring one or more class actions against several defendants. The cases often are dismissed or settled. On a second front, the same attorneys also solicit a state attorney general to join the fray, and the private attorneys file a copy-cat suit with the attorney general as the named plaintiff, often using a virtually identical copy of the private complaint. These lawsuits typically involve interstate activities, are brought against out-of-state defendants, and seek substantial individual monetary relief. Private attorneys manage the day-to-day litigation and often are paid on a contingency-fee basis from any recovery. *See, e.g.*, Office of the Attorney General, State of Mississippi, *Outside Legal Counsel* (listing more than forty "Active Contingency Fee Contracts" entered into by the attorney general's office).[7] Yet re-

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[6] *Available at* www.instituteforlegalreform.com/get_ilr_doc.php?id=939 (last visited Sept. 9, 2013).

[7] *Available at* http://agjimhood.com/index.php/sections/divisions/outside_counsel (last visited Sept. 9, 2013).

moval to federal court is resisted on the ground that the case is not a class action.

This scenario is an obvious end-run around CAFA's protections—including protection against "inadequate [state-court] supervision over ... proposed settlements." S. Rep. No. 109-14, at 4. Indeed, as one commentator has observed, outside the Fifth Circuit, "attorneys general bringing suits against corporate defendants wield tremendous bargaining clout because *parens patriae* suits might easily" be "worth potentially billions of dollars" and, in such scenarios, the pressure to settle based on the risk of a local jury "ruling against them at trial" is substantial. Durling, *Waltzing Through A Loophole: How* Parens Patriae *Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 555 (2012). And the scenario has replayed itself in lawsuits across the country against national banks and pharmaceutical companies, threatening those entities with precisely the harm that Congress sought to avoid in passing CAFA. Amici provide examples of this troubling phenomenon below.[8]

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[8] This phenomenon, however, is not limited to litigation against national banks and pharmaceutical companies. A similar pattern, for example, has manifested itself in antitrust litigation involving LCD televisions, such as this case. *See* Resp. Br. 7-9; *see also* Resp. to Pet. for Cert. 8 (noting that "much of the Petitioner's complaint is a *carbon copy* of complaints filed in the MDL Court, including the complaint filed by the class of Mississippi purchasers"); *id.* at 17 (explaining that, "in this case, Petitioner is represented by an out-of-state private law firm that specializes in representing class action plaintiffs" and that "counsel for the South Carolina Attorney General in *AU Optronics Corp. v. South Carolina* also represented a plaintiff in one of the class actions in the MDL Court in one of the related LCD cases"). Lawyers at one South Carolina firm have served as counsel for South Carolina in several LCD cases. *See South Carolina* v. *LG Display Co.*, No. 11-

A. Litigation Against National Banks

ABA members face a multiplying number of lawsuits that, although nominally brought by state attorneys general, are effectively class actions initiated, managed, and litigated by private class action counsel.

Litigation over certain banks' payment protection programs provides a telling example. In August 2011, the West Virginia attorney general sued several financial institutions, including five national banks, based on their sale of products that allow purchasers to avoid or defer credit card debt if faced with events such as unemployment or disability. *See* Mem. of Law in Supp. of Nat'l Bank Defs.' Joint Mot. To Dismiss at 1, *West Virginia ex rel. McGraw* v. *JPMorgan Chase & Co.*, No. 11-C-94-N (W. Va. Cir. Ct. Mar. 26, 2012). The complaints sought an injunction and restitution for individual consumers, as well as penalties of up to $5,000 for each alleged violation. Although brought under the state attorney general's name, the complaints identified private counsel, including well-known class action firms in Philadelphia and Dallas, as "Special Assistant Attorneys General." *See* Notice of Removal at 10-11, *West Virginia ex rel. McGraw* v. *Citigroup Inc.*, No. 11-cv-695 (S.D. W. Va. Oct. 3, 2011). These "special assistant attorneys general" managed and directed the litigation, and they apparently had a contingency-fee stake in the outcome. *See* Mem. of Law in Supp. of Defs.' Joint Mot.

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cv-729 (D.S.C.); *South Carolina* v. *AU Optronics Corp.*, No. 11-cv-731 (D.S.C.); *South Carolina* v. *Chi Mei Optoelectronics Corp.*, No. 12-cv-1776 (D.S.C.); *South Carolina* v. *Hitachi Displays Ltd.*, No. 13-cv-899 (D.S.C.). Lawyers from the same firm have also represented private parties in similar private class actions. *See Glanz* v. *Chunghwa Picture Tubes, Ltd.*, No. 07-cv-4175 (D.S.C.); *Chamberlain* v. *LG Philips LCD Co.*, No. 07-cv-533 (D.S.C.).

To Disqualify Private Counsel Appointed by the Att'y Gen. at 4-5, *West Virginia ex rel. McGraw* v. *JPMorgan Chase & Co.*, No. 11-C-94-N (W. Va. Cir. Ct. Apr. 19, 2012).

Notably, the two law firms just mentioned had previously been involved in private class actions against the same defendants, based on the same alleged conduct. Lawyers from one of the firms, for example, sued the same defendants in multiple courts across the country, including federal courts in Washington, Pennsylvania, New Jersey, Florida, and California. *See Denton* v. *Department Store Nat'l Bank*, 10-cv-5830 (W.D. Wash.); *Blackie* v. *Capital One Bank (U.S.A.), N.A.*, No. 10-cv-823 (E.D. Pa.); *Esslinger* v. *HSBC Bank USA Inc.*, No. 10-cv-3213 (E.D. Pa.); *Carr* v. *Capital One Bank (U.S.A.), N.A.*, No. 10-cv-1014 (D.N.J.); *Kardonick* v. *JPMorgan Chase & Co.*, No. 10-cv-23235 (S.D. Fla.); *In re Bank of Am. Credit Prot. Mktg. & Sales Practices Litig.*, No. 11-md-2269 (N.D. Cal.). Attorneys from the other firm were involved in at least one of those same private actions (*Esslinger*). By turning to state attorney general actions and in that way attempting to defeat removal, counsel effectively freed the lawsuits from the strictures of class certification and other procedural requirements in federal court.

Some of these same firms have also been involved in nearly identical payment protection cases brought by state attorneys general in Hawaii, Mississippi, and New Mexico. In 2012, Hawaii's attorney general sued seven credit card companies in state court, alleging that their payment protection programs are unfair or deceptive practices. *See* Notice of Removal at 2, 16-17, *Hawaii ex rel. Louie* v. *Citigroup Inc.*, No. 12-cv-271 (D. Haw. May 18, 2012) (hereafter "Hawaii Notice of Removal"). In that litigation, Hawaii is represented by the same

two law firms mentioned above. *See* Shapiro, *Hawaii files suit against 7 credit card companies*, Associated Press, Apr. 13, 2012.[9] And here again, the firms are being compensated on a contingency basis. *See* Kerr, *State suing 7 credit card companies over "fraudulent" payment protection plans*, Hawaii News Now, Apr. 12, 2012.[10] Several portions of the complaints, moreover, are copied verbatim from the complaints filed in private class actions around the country. *See* Hawaii Notice of Removal at 10. And the Hawaii litigation was brought after at least one defendant had settled a private class action that was brought by one of the firms representing Hawaii in the attorney general lawsuit. *See* Defs.' Mot. To Enjoin Prosecution of Released Claims and for Sanctions at 3-7, *Spinelli* v. *Capital One Bank (USA), N.A.*, No. 08-cv-132 (M.D. Fla. Aug. 3, 2012).

The same basic series of events is also unfolding in Mississippi. In 2012, the attorney general there filed suit in state court against several national banks that had been defendants in prior private lawsuits. *See, e.g.*, Notice of Removal at 2, *Hood ex rel. Mississippi* v. *Citigroup Inc.*, No. 12-cv-572 (S.D. Miss. Aug. 10, 2012). There too, the allegations were based on national banks' payment protection programs, and once again the complaints sought substantial individual monetary relief. The Mississippi attorney general is represented by attorneys from the same two firms identified above. *See id.* at 7-8 & n.3. And at least some, if not all, of

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[9] *Available at* http://www.businessweek.com/ap/2012-04/D9U436LG0.htm.

[10] *Available at* http://www.hawaiinewsnow.com/story/17402010/state-files-suit-against-7-credit-card-companies.

those attorneys are retained on a contingency-fee basis. *See* Retention Agreement Exs. A, B (June 28, 2012).[11]

The story in New Mexico is similar. In 2013, that State's attorney general filed nine parallel actions in state court against major credit card issuers, based on payment protection programs. *See, e.g.*, Notice of Removal at 1, 11-12 & n.2, *New Mexico ex rel. King* v. *Citigroup Inc.*, No. 13-cv-580 (D.N.M. June 20, 2013). These actions followed on the heels of private class actions that asserted virtually identical claims against the same card issuers. In the initial complaints, the attorney general was represented by a firm in Little Rock, Arkansas—a firm involved in many of the private class actions described earlier. That firm generally had either settled or lost the private lawsuits. *See id.* at 12-13 & n.5. After the initial complaints in New Mexico were filed, moreover, the Philadelphia class action firm that is involved in the West Virginia, Hawaii, and Mississippi suits was added as counsel for the State.

B. Litigation Against Pharmaceutical Companies

PhRMA's members can likewise attest to the increasing use by plaintiffs' lawyers of state attorney general suits to circumvent CAFA's protections.

Litigation against Bristol-Myers Squibb Co. and others based on the prescription drug Plavix® provides an example of this trend. In 2012, the Louisiana attorney general sued Bristol-Myers and other defendants in Louisiana state court for alleged violations of state law, based on the marketing and sale of Plavix®. *See* Pet., *Caldwell ex rel. Louisiana* v. *Bristol-Myers Squibb*

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[11] *Available at* http://www.agjimhood.com/images/uploads/forms/JPMorganChase.pdf.

Sanofi Pharm. Holding P'ship, No. 12-c-403-D (La. Dist. Ct. Jan. 23, 2012). That state-law action was brought by the attorney general "as *parens patriae*, to rectify harm done to State citizens' health, safety and welfare." *Id.* at 1. In the lawsuit, the attorney general is represented by a private attorney from Louisiana—an attorney who also represents plaintiffs in similar litigation in California, Illinois, and Texas.[12]

In 2013, the West Virginia attorney general brought similar Plavix® litigation in West Virginia state court. *See* Compl., *West Virginia ex rel. McGraw* v. *Bristol-Myers Squibb Co.*, No. 12-C-266H (W. Va. Cir. Ct. Dec. 28, 2012). That lawsuit seeks, among other things, restitution, disgorgement, or both on behalf of individual consumers arising from Plavix® prescriptions. *See* Notice of Removal at 16-17, *West Virginia ex rel. McGraw* v. *Bristol-Myers Squibb Co.*, No. 13-cv-13 (N.D. W. Va. Feb. 1, 2013). In that action, the West Virginia attorney general is represented by attorneys from four private laws firms, including the same Louisiana attorney behind the Louisiana attorney general action described above. *See id.* at 19 n.20.

Finally, the Mississippi attorney general has brought similar litigation in Mississippi state court against Bristol-Myers on behalf of Mississippi consumers who have taken Plavix®. As in the other examples

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[12] *See, e.g.*, Salim Beasley LLC, *News and Updates* (describing Plavix® litigation in Illinois), *available at* http://www.salimbeasley.com/News-and-Updates.aspx (last visited Sept. 9, 2013). The same private attorney is counsel for the County of Santa Clara, California in similar Plavix® litigation also brought in state court. *See* Compl., *County of Santa Clara ex rel. Márquez* v. *Bristol-Myers Squibb Co.*, No. 12-cv-224091 (Cal. Super. Ct. May 8, 2012).

discussed above, the attorney general is represented in that action by private attorneys from Texas. *See* Compl., *Hood ex rel. Mississippi* v. *Bristol-Myers Squibb Co.*, No. 2012-066G (Miss. Cir. Ct. Aug. 17, 2012); Notice of Removal at 2, 7 n.3, *Hood ex rel. Mississippi* v. *Bristol-Myers Squibb Co.*, No. 12-cv-179 (N.D. Miss. Aug. 17, 2012). The private attorneys in the litigation are retained on a contingency-fee basis. *See* Retention Agreement Exs. A, B (May 1, 2012).[13]

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The litigation strategy discussed herein shows no signs of abating. To the contrary, "[t]his problem threatens to grow worse as more and more federal statutes give state attorneys general authority to enforce federal laws." *Examination of Litigation Abuses: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 91 (2013) (statement of John H. Beisner, U.S. Chamber Institute for Legal Reform). The economic incentives for plaintiffs' attorneys to continue such litigation are overwhelming in circuits that, because they have embraced a "whole case" approach, make it easy for the cases to remain in state court. *See id.* ("[A] significant impetus for abusive aggregate litigation is the proliferation of arrangements under which state attorneys general hire outside counsel on a contingency basis to represent the state in civil litigation."); Center for Legal Policy at the Manhattan Institute, *supra* n.5, at 20 ("The giant ... contingency fees given to lawyers in state-contracted mass-tort and class-action lawsuits

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[13] *Available at* http://www.agjimhood.com/images/uploads/forms/Plavix.pdf.

have emerged as a major profit center for [plaintiffs' attorneys]").

The increase in such litigation, however, confronts national banks and pharmaceutical companies with the risk of cascading copy-cat attorney general actions litigated in state courts across the nation, free from the protections of class certification and other procedural requirements in federal court. Avoiding this unwarranted harm and vindicating Congress's "primary objective" in enacting CAFA, *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1350 (2013), requires rejection of the "whole case" approach to CAFA and approval of the "claim-by-claim" approach adopted by the Fifth Circuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of consumer protection laws involves both governmental litigation, such as the state *parens patriae* action at issue here, and private enforcement through individual lawsuits and class actions. Public Citizen has a longstanding interest in preserving the viability of these distinct mechanisms for protecting the rights of consumers and the general public.

Public Citizen also has an interest in the proper construction of the jurisdictional provisions of the Class Action Fairness Act (CAFA). Public Citizen was actively involved in the legislative process leading to CAFA's enactment, and although opposing the bill in general, participated in and closely followed the discussions that led to the many compromises incorporated in the final legislation. Public Citizen believes that its perspective on CAFA's language and history may assist the Court in understanding the extent to which the Fifth Circuit's construction of CAFA's "mass action" provision to encompass state *parens patriae* actions distorts the plain language and intent of CAFA.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

SUMMARY OF ARGUMENT

CAFA's enactment reflected a significant expansion of federal diversity jurisdiction. Equally significant, however, are the limitations Congress imposed on CAFA jurisdiction in order to achieve its intended goal of providing federal jurisdiction over large, multistate class actions. These limitations are expressed in various ways—the statute's $5 million amount-in-controversy requirement, its exclusion of actions against state officials and actions involving fewer than 100 class members, and its provisions limiting federal jurisdiction over controversies primarily affecting citizens of single states. *See* 28 U.S.C. §§ 1332(d)(2)-(6).

The most fundamental limitation of CAFA jurisdiction, however, is that it extends only to "class actions"—actions filed under Federal Rule of Civil Procedure 23 and its state analogs—and to a narrowly defined set of "mass actions"—cases where damages claims of 100 or more plaintiffs are proposed to be tried jointly. *Id.* §§ 1332(d)(1), (2) & (11). Mass actions are "deemed" to be class actions for purposes of CAFA removal jurisdiction, but only as to individual plaintiffs whose claims exceed $75,000. *Id.* § 1332(d)(11)(B)(i).

By CAFA's express terms, *parens patriae* actions filed in the name of states by their attorneys general fall outside the scope of CAFA jurisdiction. Such actions are not class actions because they are not based on procedural rules similar to Rule 23, which permit a member of a defined class to sue on behalf of the class as a whole if the rules' requirements are met. Nor can *parens patriae* actions be squeezed into the mass action pigeonhole and in that way be "deemed" class actions within the scope of CAFA jurisdiction. *Parens*

patriae actions are not cases in which claims of multiple plaintiffs are proposed to be tried jointly because they raise common issues of law or fact. Moreover, the mass action provision's requirement that individual plaintiffs whose claims do not exceed $75,000 be remanded to state court is exceedingly difficult to square with *parens patriae* actions.

CAFA's background and legislative history confirm what its plain language provides: *Parens patriae* actions are not mass actions. The explanations of the mass action provision in the legislative history state that it is aimed at mass joinder cases in which multiple named plaintiffs voluntarily seek to have their cases tried together. And in the final debates on CAFA, its proponents expressly stated their intention not to reach *parens patriae* actions. Congress's words and intentions matched perfectly. CAFA, as the enacting Congress intended, provides no jurisdiction over *parens patriae* actions brought by state officials.

ARGUMENT

I. CAFA's Plain Language Excludes *Parens Patriae* Actions from the Definitions of Both Class Actions and Mass Actions.

In construing a jurisdictional statute—like any other statute—this Court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 133 S. Ct. 1224, 1231 (2013). Just as in last Term's decision in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013), the Court need not look beyond CAFA's express terms to determine the scope of the jurisdiction it confers. *Parens patriae* actions fall outside the ordinary meaning of CAFA's definitions of both "class action" and "mass action," so CAFA confers no jurisdiction over

them. Any attempt to shoehorn a state officer's *parens patriae* action into CAFA's mass action definition would plunge both the federal and state courts into a procedural morass as they attempted to deal with the complexities inherent in applying CAFA's mass action provision to a fundamentally different form of proceeding.

A. CAFA Expands Federal Diversity and Removal Jurisdiction Only Over "Class Actions" and "Mass Actions" as It Defines Those Terms.

In CAFA, Congress expanded diversity jurisdiction over class actions by eliminating the requirement of complete diversity and allowing claims of individual class members to be aggregated to satisfy a $5 million amount-in-controversy requirement. *See* 28 U.S.C. §§ 1332(d)(2) & (6); *see also Knowles*, 133 S. Ct. at 1348. Congress limited this expanded jurisdiction, however, by providing that it is only available if a case "is a class action." *Id.* § 1332(d)(2). A "class action" under CAFA is a "civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B).

CAFA also provides that one additional, narrowly defined category of case "shall be deemed to be a class action" subject to removal from state to federal court under CAFA: a "mass action." *Id.* § 1332(d)(11)(A). A "mass action" under CAFA is a civil action (other than a class action as defined in § 1332(d)(1)(B)) "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or

fact." *Id.* § 1332(d)(11)(B)(i). The statute also provides an important limitation on CAFA jurisdiction as applied to mass actions: CAFA's provision for aggregation of claims in a class action to meet an overall $5 million amount-in-controversy requirement does not apply in the same way to mass actions as it does to class actions. Rather, in mass actions, as in conventional diversity cases, jurisdiction is limited to those individual plaintiffs whose claims exceed the diversity statute's basic amount in controversy threshold of $75,000 per person set forth in § 1332(a). Thus, CAFA's mass action provision states that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." *Id.* § 1332(d)(11)(B)(i).[2]

B. A *Parens Patriae* Action Is Not a Class Action Because It Is Not Filed Under Rule 23 or One of Its State Analogs.

It is apparent at the outset that a *parens patriae* action does not satisfy CAFA's basic definition of a class action because it is not filed under Federal Rule of Civil Procedure 23 or one of its state counterparts.

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[2] CAFA goes on to specify that cases with certain characteristics are not mass actions—specifically, cases involving claims arising from single-state occurrences, cases where claims are joined on the motion of a defendant, cases where claims are made on behalf of the general public under a state statute authorizing such claims, and cases where claims are consolidated solely for pretrial purposes. 28 U.S.C. §§ 1332(b)(11)(B)(ii)(I)-(IV). As the inclusion of the last category makes evident, at least some of these types of cases would not fall within the basic definition of a mass action even absent the language specifically providing that they are not mass actions.

The fundamental feature shared by these class action rules is that they provide that an individual plaintiff suffering a legal injury may bring an action on behalf of others who are similarly situated if the plaintiff and the claims he or she asserts satisfy requirements specified in the rules to determine the propriety of class-wide litigation. *See, e.g., Amgen, Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011); *Shady Grove Orth. Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, __, 130 S. Ct. 1431, 1437 (2010).

These requirements exist because "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 131 S. Ct. at 2550. "[T]o justify a departure from that rule," class action rules must "ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.* Absent a judicial determination that an individual named plaintiff can represent other class members under the criteria specified by the rules, the class cannot be bound by the outcome of the litigation. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-81 (2011). Indeed, certain features of the rules, such as the requirement of adequate representation and the necessity of class notice and the opportunity to opt out in actions seeking money damages, reflect fundamental requirements of due process. *See, e.g., Wal-Mart*, 131 S. Ct. at 2559 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

Within the constraints imposed by due process, state and federal class action rules may permissibly vary, *see, e.g., Smith*, 131 S. Ct. at 2376-78, but the

inquiry they reflect remains fundamentally similar: whether a class member may appropriately bring a claim as a representative of a class. CAFA's definition of a "class action" focuses precisely on such rules, which "must, at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class." *W. Va. ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 175 (4th Cir. 2011).

Parens patriae actions, by contrast, are not brought under the authority of class action rules—that is, rules aimed at determining the appropriateness of an individual's acting as representative of a class of which he is a member. Rather, they reflect application of common-law or statutory principles granting the state, when its sovereign or "quasi-sovereign" interests are implicated, standing to bring actions based on injuries suffered by its citizens. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Whether such an action is appropriate turns on considerations that are not expressed in Rule 23 or its state analogs. *Parens patriae* actions are therefore not filed under either Rule 23 or any state rule or law aimed at, in CAFA's words, "authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

For these reasons, the courts of appeals have agreed that the plain language of CAFA's class action definition does not encompass a *parens patriae* action. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212-13 (2d Cir. 2013) (citing cases). "In form as well as function, *parens patriae* suits lack the equivalency

to Rule 23 that CAFA demands." *Id.* They therefore fall outside CAFA's class action definition.

C. A *Parens Patriae* Action Is Not a Mass Action Because It Is Not a Proposal That Claims of Multiple Plaintiffs Be Tried Jointly on the Ground That They Share Common Issues.

The language of CAFA's mass action provision likewise cannot be stretched to encompass a *parens patriae* action filed by a state attorney general. Again, that definition applies only to cases where "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). And the definition provides that, even in such cases, federal jurisdiction does not extend to the claims of "those plaintiffs" whose individual claims do not exceed § 1332(a)'s $75,000 amount-in-controversy threshold. This definition on its face does not encompass a *parens patriae* suit.[3]

The mass action definition expressly contemplates actions in which there are multiple named "plaintiffs" whose otherwise separately asserted claims are proposed to be tried jointly. A *parens patriae* action does not propose a joint trial of claims of 100 or more "plaintiffs." Although a *parens patriae* action may involve an effort by the state to obtain relief that will

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[3] Public Citizen agrees with petitioner Hood that the clause excluding actions asserting claims "on behalf of the general public," *id.* § 1332(d)(11)(B)(ii)(III), confirms that CAFA does not provide jurisdiction here. The Court need not reach that issue, however, because *parens patriae* actions do not meet the basic definition of mass actions.

ultimately benefit individual citizens of the state who have been injured, the action encompasses the claims of a single plaintiff—the state, proceeding through its relator, the attorney general. As the Seventh Circuit put it in *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011), in a *parens patriae* action "only the ... Attorney General makes a claim for damages." *Id.* at 772. Thus, "[by] the plain language of § 1332, this suit is not removable as a mass action." *Id.*

Not only does a *parens patriae* suit not involve claims of multiple "plaintiffs," it also does not involve a proposal for a joint trial of otherwise separate claims on the ground that they involve "common questions of law or fact." The reference to a joint trial presupposes claims that otherwise would be subject to separate trials, which does not square with claims made in a single complaint by a single plaintiff—the state. Describing such a complaint as a proposal for a joint trial stretches English usage further than the language allows.

Moreover, the determination of whether a *parens patriae* action is proper does not involve an inquiry into whether otherwise separate claims asserted by different plaintiffs involve "common questions." While the presence of common legal or factual questions may be determinative of whether separate plaintiffs may *join* their claims in a single action under rules such as Federal Rule of Civil Procedure 20(a)(1)(A), or whether separate actions may be *consolidated* for trial under rules such as Federal Rule of Civil Procedure 42(a), it does not aptly characterize the grounds on which *parens patriae* actions are filed by state attorneys general. The terms used in CAFA's definition of a mass action plainly describe cases in-

volving "the joinder of multiple plaintiffs in a single suit," *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008), as well as cases in which plaintiffs in separate suits move to consolidate their cases for trial on the ground that they present common questions of law or fact. *See, e.g., In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012).[4] By contrast, *parens patriae* suits are not proposals for joint trials based on the existence of common questions.

That mass actions under CAFA include only actions where claims of multiple named plaintiffs are joined for purposes of trial is confirmed not only by the plain language of the primary definition of the term, but also by the limitation on federal jurisdiction that immediately follows and is incorporated in the statutory definition: "except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [of section 1332]." 28 U.S.C. § 1332(d)(11)(B)(i). This language not only presupposes the existence of individually identifiable "plaintiffs," but also imposes, at a minimum, an obligation on a court to remand claims of any particular plaintiffs whose claims would not meet the amount-in-controversy requirement for conventional diversity jurisdiction under § 1332(a).[5]

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[4] Consolidation at the behest of a defendant, however, does not qualify a case for treatment as a mass action. 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

[5] The lower courts have not resolved whether establishing that there are individual plaintiffs whose claims exceed $75,000 is part of the defendant's threshold burden to establish the propriety of removal. *Compare Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (remanding case where defendant failed

(*Footnote continued*)

As the Eleventh Circuit has recognized, the language of the "except" clause refers "to individual plaintiffs and their claims." *Lowery*, 483 F.3d at 1205. The clause unambiguously reflects Congress's intent that the mass action provision apply to instances where individual named plaintiffs have filed claims jointly (or proposed a joint trial of separately filed actions). Only in that circumstance does it make sense to provide that jurisdiction is limited to "those plaintiffs" whose claims would otherwise be subject to jurisdiction under §1332(a).

Indeed, implementing the statutory command that claims of individual plaintiffs that do not meet the amount-in-controversy requirement of § 1332(a) be remanded to state court would prove a procedural nightmare if the Fifth Circuit's view that *parens patriae* actions are mass actions were to prevail. The district court would be obligated either to identify the individual citizens who might ultimately receive relief if the state's claims were successful and remand those whose potential claims did not exceed $75,000, or else to remand to the state court a parallel *parens patriae*

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to show that even one plaintiff had claims whose value exceeded $75,000), *with Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1203–07 (11th Cir. 2007) (expressing doubt that showing the existence of plaintiffs with claims exceeding $75,000 is a threshold requirement). Nonetheless, there is no disagreement that individual plaintiffs whose claims do not exceed $75,000 are outside of federal jurisdiction, and their claims must be remanded to state court if they are included in a mass action otherwise subject to removal under CAFA. *See also* S. Rep. No. 109-14, at 47 (2005) ("[A]ny claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court.").

action on behalf of those citizens with losses not exceeding $75,000, while retaining only a *parens patriae* action seeking recoveries to benefit citizens with losses exceeding $75,000. The first alternative would likely be impossible, or at least extremely burdensome, while the second would result in significant duplication of effort between the state and federal court systems. Adding to these complexities, the state's own claims for damages that *it* suffered, as well as claims for penalties and injunctive relief as to which the state is concededly the real party in interest, would also likely require remand, as they do not fall within federal jurisdiction under § 1332(a). And at the end of the day, any resolution of whatever part of the case remained in the federal system would not be binding on any person who lacked an individual claim that was not subject to jurisdiction under § 1332(a).

The procedural difficulties inherent in any effort to treat a state's *parens patriae* action as a CAFA mass action only underscore that the statute means what it says. A mass action is one where claims of separate plaintiffs are proposed to be tried jointly, not one where a single plaintiff, the state through its attorney general, asserts claims based in part on injuries to its citizens.

II. CAFA's History Confirms That *Parens Patriae* Actions Are Not Class Actions or Mass Actions.

That Congress did not intend the strange consequences described above is confirmed not only by the language of the mass action provision, but also by CAFA's legislative history. The history is replete with explanations that the mass action provision is aimed at cases involving claims of multiple named plaintiffs

that are joined or consolidated for trial, and that it has no impact on *parens patriae* claims by state attorneys general.

The forerunner of the mass action provision appeared in a version of CAFA introduced in the House of Representatives in the 107th Congress, which provided that a civil action that is not otherwise a class action (because not filed under Rule 23 or one of its state analogs) would be "deemed" a class action if "monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact." H.R. 2341, 107th Cong. § 4(a)(2) (2001).[6] The bill's sponsor explained that the provision was aimed at actions in which a "multitude of plaintiffs" sought relief. H.R. Rep. No. 107-370, at 97 (2002) (statement of Rep. Goodlatte in Committee mark-up session).

Versions of CAFA introduced in both the House and Senate in the 108th Congress included similar provisions. *See* H.R. 1115, 108th Cong. § 4(a)(2) (2003); S. 274, 108th Cong. § 4(a)(2) (2003).[7] Committee reports on both bills confirmed what the plain language of the bills indicated: The statutory language was aimed at actions in which claims of individually identified plaintiffs are joined for purposes of trial. In virtually identical language, the reports described the "mass actions" that would be deemed to be class actions as "suits that are brought on behalf of

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[6] The relevant language would have been inserted into 28 U.S.C. § 1332 as a new subsection (d)(9)(A).

[7] Again, the relevant language in the bills as introduced would have been codified as 28 U.S.C. § 1332(d)(9).

hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part." H.R. Rep. No. 108-144, at 35 (2003) (emphasis added); *see* S. Rep. No. 108-123, at 42 (2003) (using identical language except for the addition of "simultaneously" before "in a single proceeding").

The House Report also included the bill's sponsor's explanation that the mass action provision was aimed in large part at mass joinder proceedings in Mississippi and West Virginia state courts, in which mass actions had been "used to consolidate for trial the claims of as many as 8,000 plaintiffs ...." H.R. Rep. No. 108-144, at 94. The sponsor explained that mass actions were effectively "opt-in class actions in the sense that they *include only those claimants who have affirmatively consented to the inclusion of their claims in the action*." *Id.* at 92 (emphasis added).

Notably, the early versions of the mass action provision introduced in the 107th and 108th Congresses would have covered not only claims of multiple plaintiffs proposed to be tried jointly, but also so-called "private attorney general actions," defined in the proposed bills as cases in which "the named plaintiff purports to act ... for the interests of the general public" in seeking monetary relief. *See* H.R. 2341, 107th Cong. § 4(a)(2) (2001); H.R. 1115, 108th Cong. § 4(a)(2) (2003); S. 274, 108th Cong. § 4(a)(2) (2003). The bills, however, added that such actions would *only* be deemed class actions for CAFA purposes if the named plaintiff was "not a State attorney general." A Justice Department official testifying in favor of

CAFA at a House hearing in 2003 emphasized that the provision requiring that certain cases be deemed class actions even if not so labeled was "exclusive" of actions brought by "a State attorney general" and applied only to "private attorney general suits" as well as suits involving claims of 100 or more plaintiffs. *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the House Comm. on the Judiciary* 8-9, 108th Cong., 1st Sess. (2003) (testimony of Viet Dinh, Assistant Attorney General, Office of Legal Policy).

As ultimately enacted, the mass action provision of CAFA dropped the provision deeming private attorney general suits to be class actions, and replaced it with a provision, 28 U.S.C. § 1332(d)(11)(B)(ii)(III), that makes explicit that such actions are *not* deemed class actions. It would be nonsensical to conclude that in deleting the provision deeming *private* attorney general suits to be class actions and replacing it with a specific exclusion covering such suits, CAFA proponents somehow intended to provide that suits actually brought by *state* attorneys general—which they had previously taken pains *not* to deem class actions—would now be considered class actions even while private attorney general actions were not. Indeed, the fact that CAFA initially provided that actions brought in the name of the general public, *except* for actions brought by state attorneys general, would be deemed to be class actions, and then was altered to provide explicitly that such actions would *not* be deemed class actions—with *no* exception for actions brought by state attorneys general—provides striking confirmation that CAFA was not intended to cover *parens patriae* actions brought by state attorneys general.

CAFA's definition of mass actions was altered to its final form—actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332] subsection (a)"—later in the 108th Congress, in S. 2062 (2004). The legislation ultimately enacted as CAFA in the 109th Congress, Pub. L. No. 109-2 (2005), was identical to S. 2062. Although the wording was slightly different from that in the bills that were the subjects of the 2003 House and Senate Reports, the differences, including the explicit references to "plaintiffs," made even clearer that the provision was aimed at cases in which claims of individual named plaintiffs were joined.

The Senate Report on the legislation as finally enacted, moreover, again referred to mass actions as "suits that are brought on behalf of numerous *named plaintiffs* who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status," and it explained that under the mass action provision, "any civil action in which 100 or more *named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes." S. Rep. No. 109-14, at 46 (2005) (emphasis added).

The drafting history thus underscores what the statutory language itself makes plain: The mass action provision applies to cases in which claims of multiple named plaintiffs are joined. *Parens patriae* ac-

tions by state attorneys general do not meet that description.

Indeed, the statute's history reveals that in the final debates over CAFA, Congress considered and decisively rejected the possibility that the statutory language might provide for federal jurisdiction over *parens patriae* actions. When CAFA reached the Senate floor for final consideration in February 2005, Senator Pryor introduced an amendment that would have provided that the term "class action" in CAFA's jurisdictional provisions would "not include any civil action brought by, or on behalf of, any [state] attorney general." 151 Cong. Rec. S1157 (Feb. 9, 2005). As Senator Pryor explained, the amendment was not intended to alter CAFA's scope, but merely to "clarif[y]" it, *id.* at S1158, to address concerns expressed by state attorneys general that the statute might be "misconstrued" to apply to *parens patriae* actions. *Id.* (quoting letter from 46 state attorneys general).

As they carefully explained, CAFA's sponsors opposed the amendment not because they intended CAFA to cover *parens patriae* actions, but because the amendment was "unnecessary," *id.* at S1163 (Sen. Hatch), as it was "perfectly clear" that the bill would not apply to *parens patriae* actions, which were "excluded from the reach of the bill." *Id.* at S1164. Each of the other CAFA proponents who spoke in opposition to Senator Pryor's amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id.* at S1160 (Sen. Specter), S1161 (Sen. Carper), S1161-62 (Sen. Cornyn), S1163 (Sen. Grassley). Senator Grassley's remarks are typical:

> [I]n my judgment, the amendment is not necessary. I will explain. State attorneys general have authority under the laws of every State to bring enforcement action to protect their citizens. Sometimes these law[suit]s are parens patriae cases, similar to class actions in the sense that the State attorney general represents the people of that State. In other instances, their actions are brought directly on behalf of that particular State. But they are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes.

Id.

CAFA's proponents also objected that the Pryor amendment was overbroad because its wording could be read to immunize even a conventional Rule 23-type class action from removal if a state attorney general happened to be a member of the class or if the state attorney general had somehow authorized the class's counsel to represent the class. *See id.* at S1161 (Sen. Specter); S1162 (Sen. Cornyn); S1163 (Sen. Grassley); S1164 (Sen. Hatch). Nothing in those comments, however, suggested that CAFA would ever provide for federal jurisdiction over a state *parens patriae* action initiated by a state attorney general in the name of the state. Rather, as Senator Grassley stated unequivocally, "our bill *will not affect those lawsuits*." *Id.* at S1163 (emphasis added).

In short, CAFA's supporters unanimously disclaimed any intent to bring *parens patriae* actions within federal jurisdiction. Accordingly, Senator Pryor's amendment was rejected. *Id.* at S1165. The debate over the amendment strongly underscores

what is evident from the text of the statute and the explanations offered in the committee reports: CAFA does not authorize a *parens patriae* action to be deemed a class action for purposes of CAFA jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state-court action filed by a state attorney general is removable under the "mass action" provision of the Class Action Fairness Act of 2005 ("CAFA") where the State is the only named plaintiff but the action includes monetary claims on behalf of more than 100 citizens of the State?

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited, accountable government. To that end, WLF regularly appears in cases such as this one to support the right of class action defendants to remove state court actions to federal court under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12. *See, e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011); *Cappuccitti v. DirecTV, Inc.*, 611 F.3d 1252 (11th Cir. 2010), *vacated on reh'g*, 623 F.3d 118 (2010).

WLF believes that out-of-state defendants, in order to ensure that their cases will be heard in an impartial forum, ought to be permitted to remove those cases from state to federal court. Congress adopted CAFA to ensure that the right of removal is protected for most such defendants, particularly in cases where the plaintiff is seeking monetary claims on behalf of more than 100 people. WLF is concerned

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and standing letters of consent have been lodged with the Clerk of Court.

that remanding such cases to state court will only allow plaintiffs' lawyers to game the system and avoid removal—the very thing that Congress sought to prevent when it adopted CAFA.

STATEMENT OF THE CASE

Enacted by Congress in 2005, CAFA expands federal diversity removal jurisdiction for all "mass actions." *See* 28 U.S.C. § 1332(d)(11) (2006). CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly." *Id.* § 1332(d)(11)(B). Mass actions under CAFA are deemed to be class actions removable to federal court to the extent that they otherwise satisfy the remaining requirements of a class action under § 1332(d)(2)-(10). *See id.* § 1332(d)(11)(A). CAFA's minimal diversity requirement is satisfied when "any member of a class of plaintiffs" is a citizen of a State different from any defendant. *Id.* § 1332(d)(2). Such "class members" under CAFA include those "persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action." *Id.* § 1332(d)(1)(D).

In March 2011, the Mississippi Attorney General brought suit in Mississippi state court against twenty-two multinational corporate entities "on behalf of the State of Mississippi in its proprietary capacity on its own behalf, and on behalf of Mississippi residents, including local governmental entities." Resp. App. at 65a. The complaint alleged a conspiracy to fix prices for liquid crystal display (LCD) panels in the international market from 1996 to 2006 and asserted claims for

alleged violations of the Mississippi Consumer Protection Act (MCPA), Miss. Code Ann. § 75-24-1, *et seq.*, and Mississippi's Antitrust Act (MAA), Miss. Code Ann. § 75-21-1, *et seq.* *See id.* at 60a-64a. In its prayer for relief, the complaint specifically sought restitution not only for the State's purchases of LCD products, but also "for the purchases of its citizens." *Id.* at 73a.

Relying on CAFA's "mass action" provision, Respondents removed the action to the U.S. District Court for the Southern District of Mississippi. Resp. App. at 70a-87a. Petitioner moved to remand the action back to state court for lack of federal jurisdiction. Pet. App. 23a. Although agreeing that the suit constituted a mass action under CAFA because Mississippi consumers were among the "real parties in interest," the district court nevertheless held that CAFA's general-public exception, 28 U.S.C. § 1332(d)(11)(B)(ii)(III), deprived the court of federal jurisdiction. *Id.* at 23a-60a.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed. Pet. App. at 1a-12a. The appeals court agreed with the district court that the real parties in interest include "those more than 100 persons who, by substantive law, possess the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Id.* at 5a. Applying a claim-by-claim approach, the court recognized that both "the State (as a purchaser of LCD products) *and* individual citizens who purchased the products within Mississippi possess 'rights to be enforced.'" *Id.* at 5a (emphasis in original). Relying on this Court's precedent in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458

U.S. 592, 602 (1982), the appeals court held that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a.

Because "individual consumers, in addition to the State, are real parties in interest," the Fifth Circuit reversed the district court's application of CAFA's general-public exception. Pet. App. at 10a-12a. In doing so, the court relied on the express language of § 1332(d)(11)(B)(ii)(III), which requires that "*all* of the claims" be asserted on behalf of the public in order for the exception to apply. Accordingly, the court held that because the statutory prerequisites of CAFA's general-public exception could not be met, removal was proper under CAFA. *Id.* at 12a.

Petitioner unsuccessfully sought rehearing *en banc*. *See* Pet. App. 64a.

SUMMARY OF ARGUMENT

Seven years ago, Congress took an important step toward the expansion of federal jurisdiction over large, unwieldy mass actions with the enactment of CAFA. The primary goal of CAFA was to expand a defendant's ability to remove to federal court any interstate mass action that did not satisfy the traditional requirements for diversity jurisdiction. Notwithstanding Congress's desire to expand the ability of mass-action defendants to remove such suits to federal court, some state attorneys general have increasingly sought to evade removal by bringing *parens patriae* suits to recoup monetary damages on behalf of the State's citizens. By

strategically omitting the real parties in interest as named plaintiffs in their complaints, state attorneys general (and their outside counsel) have been able to obtain large jury awards against foreign defendants in local courts.

Because CAFA was adopted to protect minimally diverse mass-action defendants from potential state-court bias, it makes little sense to suppose that Congress intended to grant CAFA removal rights in representative "mass actions" brought by a State plaintiff who is nominally joined in the suit by its injured citizens, but to deny such removal rights in those cases where the State brings a *parens patriae* suit to recoup damages for those very same citizens who, though unnamed, remain real parties in interest. It is precisely in this type of case—in which the potential for bias against out-of-state defendants is greatest—that Congress was most anxious to protect removal rights under CAFA.

No defendant in this case is a citizen of Mississippi. Protecting out-of-state defendants, such as Respondents, from the discriminatory treatment it was feared they would suffer in state courts was one of the Framers' primary rationales for establishing a federal court system and creating a right of removal from state court. As a result, depriving foreign defendants of a federal forum is inconsistent with the Framers' understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our system of jurisprudence. By retaining jurisdiction over this action, the appeals court decision below vindicates both the design of the Framers and the interests of Congress in enacting CAFA.

Petitioner argues that "longstanding principles of federalism" require that any doubts about removal in this case should be resolved against the exercise of federal jurisdiction. Pet. Br. at 27. Notwithstanding Petitioner's peculiar understanding of federalism, no support exists in the historical record for the suggestion that a lawsuit filed by a State in its own courts should not be removable to federal court by an out-of-state defendant. Indeed, this Court has never suggested that principles of federalism are somehow at odds with removal from state court to federal court. Federalism is not and never has been a doctrine that protects the "home cooking" of far-flung defendants in local state courts. To the contrary, the Court has repeatedly recognized the vital role that both diversity and removal jurisdiction have played in our federal system.

Equally flawed is Petitioner's insistence that a "strong presumption" exists against statutory removal rights. Such a presumption cannot be justified on historical grounds, given the Framers' robust support for removal jurisdiction as an important safeguard against the potential bias of state courts. Nor can it be justified as a reflection of congressional policy, in light of Congress's repeated adoption of legislation over the past 70 years that has expanded, not contracted, removal jurisdiction. Petitioner's interpretation of CAFA's mass action provision is erroneous regardless of any alleged presumption against removability; but that interpretation is rendered wholly implausible in light of the fact that Congress never intended for courts to apply such a presumption in the first place.

ARGUMENT

I. PERMITTING CAFA REMOVAL OF A LAWSUIT FILED BY A STATE OFFENDS NO NOTION OF FEDERALISM OR STATE SOVERIGNTY

Petitioner insists that any doubts about removal in this case should be resolved against the exercise of federal jurisdiction under "longstanding principles of federalism." Pet. Br. at 27. But this Nation's historical understanding of federal removal rights does not support Petitioner's view. To the contrary, the Framers of the Constitution expressly contemplated that federal removal jurisdiction—even in cases involving a State as plaintiff—would play a vital role in our federal system of concurrent jurisdiction.

Article III, Section 2 of the Constitution expressly provides that the federal "judicial Power shall extend . . . to Controversies . . . between a state and citizens of another state." U.S. Const. Art. III, § 2. The importance of protecting out-of-state defendants from the biases of state courts in cases where a State is litigating as a plaintiff was widely discussed prior to ratification of the Constitution. During the early debates on the Constitution, James Madison took to the floor at the Virginia ratifying convention to reassure delegates of the purpose behind federal jurisdiction in such cases:

> Its jurisdiction in controversies *between a state and citizens of another state* is much objected to, and perhaps without reason. It is not in the power of individuals to call

> any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot 2d ed. 1854) (emphasis added). Madison went on to explain that jurisdiction in such cases "can have no operation but this—to give a citizen a right to be heard in the federal courts." *Id.*

Alexander Hamilton agreed. "The power of determining causes . . . *between one State and the citizens of another*," Hamilton argued in *Federalist* 80, is "essential to the peace of the Union." THE FEDERALIST NO. 80 (Alexander Hamilton) (emphasis added). For that reason, "[t]he national judiciary ought to preside in all cases in which one State or its citizens are opposed to another state or its citizens." *Id.* For Hamilton, a federal forum, "having no attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." *Id.*

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction, standing alone, could not by itself fully address the problem of state-

court bias, since it provides no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed this concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove that suit to federal court. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880).

This Court has long recognized that the right of removal to federal court grants defendants the same protection from local prejudices in State court that diversity jurisdiction grants to plaintiffs: "The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular admission of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816). Those who framed the Constitution sought to preserve national harmony and promote interstate commerce by ensuring that a neutral forum, composed of nonelected judges whose independence from local attachments is secured by life tenure and salary protection, would be available for interstate disputes.

Notwithstanding Petitioner's claims to the contrary, Pet. Br. at 29-31, this Court has never suggested that principles of federalism are somehow at odds with removal from state court to federal court. As Chief Justice Marshall explained only two decades after ratification:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Nor has this Court ever suggested that lower courts should adopt a federalism-based presumption against the exercise of removal jurisdiction. Rather, the Court has repeatedly recognized the vital role that both diversity and removal jurisdiction have played in our federal system. *See Dodge v. Woolsey*, 18 U.S. (18 How.) 331, 354 (1855) (stating that the purpose of diversity jurisdiction is "to make people think and feel, though residing in different states of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit").

Petitioner argues that removal jurisdiction somehow raises special federalism concerns where, as here, a State is itself a plaintiff in the litigation. *See* Pet. Br. at 29 (citing *Alden v. Maine*, 527 U.S. 706, 709 (1999)). Despite Petitioner's idiosyncratic understanding of federalism, no support exists for

the suggestion that a lawsuit filed by a State in its own courts should not be removable to federal court by an out-of-state defendant. While federalism is concerned with protecting States and State prerogatives from federal intrusion and overreach, it has no interest in preventing legal disputes brought by States against the citizens of other States to be adjudicated in a neutral court. Rather, consistent with federalism, each State is equally protected against the depredations by other States against its own citizens.

After all, Article III, § 2 of the Constitution expressly provides that the judicial power of the United States extends to controversies "between a State and Citizens of another State." As *Alden* recounts, this provision drew criticism at the ratifying conventions from those who feared that it would permit States to be involuntarily "dragged before" a federal court in suits brought by out-of-state plaintiffs. *Id.* at 717-19 (internal citations omitted). Supporters of the Constitution, including James Madison and John Marshall, responded that Article III did not authorize such suits but rather created jurisdiction over suits *brought by* States against out-of-state defendants. *Id.*

In *Alden*, the Court addressed only whether the State of Maine could be sued in its own courts against its will for alleged violations of federal law. In answering that question in the negative, the Court explained that "[t]he generation that designed and adopted our federal system considered immunity *from suit* to be central to sovereign dignity." *Id.* at 715 (emphasis added). But *Alden* nowhere suggests that a State that initiates litigation as a plaintiff in

its own courts somehow has a sovereign interest in preventing out-of-state defendants from removing that case to federal courts. In arguing to the contrary, Petitioner's purported reliance on *Alden v. Maine*, Pet. Br. at 29, is especially misplaced.

If anything, *Alden* actually *undermines* Petitioner's position in this case by establishing that the Founders had no objection to requiring States proceeding as plaintiffs to litigate their suits in federal court. As early as 1787, James Madison had voiced his support for Article III removal jurisdiction in cases involving a State as a plaintiff, on the very grounds that in such cases, removal secures "a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." *Alden*, 527 U.S. at 717 (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot 2d ed. 1854)). By referring to the "right" of a citizen who has been sued by a State "to be heard in federal courts," Madison revealed that he had no objection to removal jurisdiction in a case such as this one, where the State has "condescend[ed] to be a party" by filing suit in the first place.

Despite Madison's assurances regarding the limited scope of the jurisdictional grant, this Court ruled in *Chisholm v. Georgia*, 2 Dall. 419 (1793), that Article III, § 2 permitted States to be sued in federal court by citizens of other States. Widespread opposition to *Chisholm* led directly to adoption of the Eleventh Amendment, which provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. Nevertheless, relying on the text of Article III, § 2, this Court has roundly rejected any suggestion that the Eleventh Amendment somehow bars the removal of cases in which a State is a *plaintiff*. *See, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821) ("The [Eleventh] Amendment . . . extends to suits commenced or prosecuted by individuals, but not to those brought by States."). The federal appeals courts have repeatedly reinforced that holding. *See In re MTBE Prods. Liability Litig.*, 488 F.3d 112, 119 (2d Cir. 2007); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 848 (9th Cir. 2004); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004); *Regents of Univ. of Calif. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564-65 (Fed. Cir. 1997); *Huber, Hunt, & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n.6 (5th Cir. 1980).[2]

Finally, in enacting CAFA, Congress fully took into account states' sovereign interests in adjudicating purely local matters. These concerns are reflected in express statutory exceptions to CAFA jurisdiction. The so-called "home state" exception requires the district court to decline jurisdiction where more than two-thirds of the

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[2] Of course, state sovereign immunity is broader than and exists independently of the immunity provided by the Eleventh Amendment. But the federal circuits likewise are unanimous in holding that removal to federal court does not violate state sovereign immunity. See, *e.g.*, *In re MTBE Prods.*, 488 F.3d at 119; *Dynegy*, 375 F.3d at 848.

putative class members are citizens of the state in which the action was originally filed. *See* 28 U.S.C. § 1332(d)(3). Likewise, the "local controversy" exception allows the district court to decline to exercise jurisdiction where more than one-third but fewer than two-thirds of putative class members are citizens of the state where the action was originally filed. *See* 28 U.S.C. § 1332(d)(4). Finally, CAFA excludes diversity jurisdiction for any action in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C. § 1332(d)(5)(A). In doing so, CAFA fully accounts for the Eleventh Amendment because, as even Petitioner concedes, the Eleventh Amendment is not concerned with actions brought by States. *See* Pet. Br. at 30 n.6

II. NO BASIS EXISTS TO STRICTLY CONSTRUE CAFA OR OTHER FEDERAL REMOVAL STATUTES

Relying on dicta found in this Court's 1941 opinion *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), Petitioner urges the Court to strictly construe removal statutes such as CAFA. *See* Pet. Br. at 27-29 (invoking "the principle favoring narrow construction of jurisdictional statutes"). Contrary to Petitioner's call for the "narrow construction" of removal statutes, however, nothing in *Shamrock Oil* requires this Court to adopt a presumption against removal. Rather, *Shamrock Oil* must be understood in the broader context of removal jurisdiction's expanding and contracting legislative history.

The federal government's distrust of state

courts' ability to deal fairly with out-of-state litigants reached its zenith in the aftermath of the Civil War. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that broadened both the original and removal jurisdiction of the federal courts. This legislative initiative culminated in the Jurisdiction and Removal Act of 1875, which not only vested federal courts with federal question jurisdiction for the first time,[3] but also significantly expanded removal jurisdiction. *See* 18 Stat. 470 (Mar. 3, 1875). Among other provisions, the 1875 law provided for removal of state court cases raising federal questions, allowed plaintiffs to remove cases they had initially filed in state courts, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and guaranteed appellate review of remand orders. *Id.*

This experiment with vastly expanded removal jurisdiction lasted only 12 years, when the Judiciary Act of 1887 largely eliminated the expansions adopted in 1875. *See* 24 Stat. 552 (Mar. 3, 1887). That Act not only eliminated the right to removal by plaintiffs and in-state defendants, it also increased the amount in controversy requirement to $2,000, restricted "citizenship" to the state where a defendant was an "inhabitant" rather than where he

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[3] The very fact that the federal courts did not enjoy general federal question jurisdiction until 1875 severely undercuts any suggestion that the federal courts exist primarily for the purpose of addressing federal issues, with state-law issues more appropriately being reserved for state courts. To the contrary, before 1875, the overwhelming majority of cases in the federal courts addressed state-law issues.

"shall be found," forbade plaintiffs who initiated a suit in state court to remove it to federal court, and returned to the original 1789 rule that suits for promissory notes could only be brought in courts where the assignor could have filed suit. *Id.*

Subsequent opinions by this Court acknowledged that Congress, beginning in 1887, adopted removal statutes narrower than the short-lived expansions of 1875. But rather than abandon the Framers' commitment to diversity and removal jurisdiction, the Judiciary Act of 1887 simply *restored* the law of diversity removal to the original provisions contained in the Judiciary Act of 1789. Thus, in 1941 the Court in *Shamrock Oil* rejected a state-court plaintiff's claim that it qualified as a "defendant" entitled to remove litigation to federal court after it was served with a counterclaim. *Shamrock Oil*, 313 U.S. at 100. Recognizing that removal by plaintiffs was authorized by the 1875 removal statute, the Court noted that such authorization was eliminated by Congress in 1887. *Id.* at 108-09. Accordingly, "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Id.* In other words, in construing the removal statute, the Court was obliged to adhere to "the policy of the successive acts of Congress" in the years following 1887.

Petitioner cites *Shamrock Oil* as the basis for its claim that CAFA must be "narrowly" and "strictly" construed. *See* Pet. Br. at 27. But *Shamrock Oil*'s "strict construction" dicta must be understood in the historical context of the legislative history discussed above—namely, the 1875

expansion of removal jurisdiction and its subsequent retrenchment in the Judiciary Act of 1887 (and the removal statutes adopted in the decades that followed). Certainly, nothing in *Shamrock Oil* even remotely suggests that federal courts should apply any constitutionally based presumptions either for or against the right of removal. Rather, jurisdiction under a removal statute must be interpreted "according to the precise limits which the statute has defined." *Shamrock Oil*, 313 U.S. at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 279 (1934)).

Any late-nineteenth-century congressional policy of strictly construing removal rights is no longer in place. In the absence of such a policy, no presumption against removability can be justified. *See generally*, Scott Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609 (2004). Over the past 70 years, Congress has enacted a series of laws that have expanded removal rights. Unsurprisingly, in the 70 years since *Shamrock Oil*, this Court has never once repeated its "strict construction" dicta. Rather, this Court's modern jurisprudence has decided removability questions solely by reference to the relevant statutory language, nothing more.

For example, in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), the availability of removal turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), which permits removal of any state-court civil action over which the federal courts would have had original jurisdiction. This Court explicitly and unanimously rejected the plaintiff's argument that *Shamrock Oil* somehow required the Court to interpret the

ambiguous clause as precluding removal. After acknowledging *Shamrock Oil*'s "strict construction" dicta, the Court went on to dismiss it: "But whatever apparent force this argument might have claimed when *Shamrock Oil* was handed down has been qualified by later statutory development." *Breuer*, 538 U.S. at 697.

Of course, the most recent evidence that Congress does not require a presumption against removability is its adoption of CAFA in 2005. The express purpose of CAFA was to greatly expand the federal courts' jurisdiction over large, nationally important class and mass actions. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. 109-14, 109th Cong. 1st Sess., at 43 (Feb. 28, 2005). Accordingly, CAFA lowers the barriers to federal court by adjusting the amount in controversy requirement, dispensing with the rule that all plaintiffs must be diverse from all defendants, and eliminating the absolute bar on removal by home-state defendants in diversity actions. *See* 28 U.S.C. § 1332(d)(2)-(4). In short, CAFA "enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

CAFA's provisions are to be read broadly, with "a strong preference" that large interstate actions "should be heard in a federal court if properly removed by any defendant." S. Rep. 109-14, 109th Cong. 1st Sess., at 43 (Feb. 28, 2005); *see id.* at 42 ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable

jurisdictional requirements are not satisfied)."); 151 Cong. Rec. H723-01, at H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("If a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case"). As the Fourth Circuit's Judge Niemeyer has rightly observed:

> CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, thus reversing the restrictive federal jurisdiction policies of Congress that both *Healy* and *Shamrock Oil* listed as the primary justification for application of the canon [of strict construction of removal statutes] . . . . [T]his stated purpose for expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it.

Palisades Collections LLC v. Shorts, 552 F.3d 327, 342 (4th Cir. 2008) (Niemeyer, J., dissenting).

CAFA was adopted for the purpose of protecting the precise category of defendants at issue in this case—out-of-state defendants against whom large damage claims have been asserted and who fear they may be discriminated against in state court. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) (agreeing that Congress intended that CAFA's use of the term "class action" should be "broadly defined to prevent jurisdictional gamesmanship" and not confined "solely to suits that are labeled 'class actions' by the

named plaintiff or the state rulemaking authority").

The Seventh Circuit has explicitly rejected the assertion that removal rights under CAFA ought to be strictly construed, or that federal jurisdiction should be denied if there is doubt as to the right of removal. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular."). In *Back Doctors*, the appeals court rejected plaintiffs' demand that CAFA be narrowly construed, holding instead that CAFA should be implemented "broadly" and "liberally," "according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions." *Id.*

Suffice it to say, Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992). If state attorneys general and their outside counsel are permitted to rely on their *parens patriae* authority to circumvent CAFA at will, thereby evading congressionally-mandated protections whenever they wish, the very purpose of CAFA will be eviscerated. Accordingly, this Court "should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment below.

Respectfully submitted,

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